Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCKHEED CORPORATION,
Petitioner,

v.

MICHAEL MOSES SCHNEIDER, suing through his adoptive parents GARY AND SANDRA SCHNEIDER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether district courts have discretion to tax as costs fees and expenses that are not enumerated in 28 U.S.C. 1920, notwithstanding this Court's decisions in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), and the decisions of other courts of appeals, holding that nonstatutory items may not be taxed as costs.

PARTIES BELOW

In addition to the parties identified in the caption of this petition, the following were parties in the court of appeals:

1. Melissa Hope Marchetti, who sued through her adoptive parents Dennis and Pamela Marchetti, was an appellee and cross-appellant. Her action against Lockheed was settled after entry of judgment by the court of appeals.

2. James Zimmerly, who sued through his adoptive parents Melvin E. and Wanda Zimmerly, was an appellee and cross-appellant.

3. The United States of America was an appellant and cross-appellee. In the respects relevant to the issues on appeal the interests of the United States were identical to Lockheed's, and in the court of appeals the United States adopted Lockheed's briefs.*

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* In 1977 the name of Lockheed Aircraft Corporation was changed to Lockheed Corporation. It has no parent company and no subsidiaries which are not wholly owned. Its affiliates are: Arizona Fueling Facilities Corp., Alaska State Fueling Facilities Corp., CTL Corp., Honolulu Fueling Facilities Corp., Letlock Saudi Arabia Co. Ltd., Ocean Minerals, Inc., Oklahoma Fueling Facilities Corp., Panel Lock Homes (Phil.), Inc., Reno Fueling Facilities Corp., San Francisco Fueling Facilities Corp., Transnational Housing Co., and Utah Fuel Facilities Corp.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-47a) is reported at 658 F.2d 835. The April 12, 1979 opinion of the district court (Pet. App. D, pp. 57a-71a) is reported at 476 F. Supp. 521 (D.D.C. 1979). The relevant portion of the district court's October 30, 1980 Comprehensive Pretrial Order (Pet. App. E, pp. 72a-74a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 48a-50a) was entered on May 19, 1981. The opinion of the court of appeals was entered on June 17, 1981. Timely petitions for rehearing were

denied on October 9, 1981 (Pet. App. C, pp. 51a-56a).[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

Section 1920 of Title 28 of the United States Code (1976 & Supp. III) and Rule 17(c) of the Federal Rules of Civil Procedure are reproduced at Pet. App. F, p. 75a.

STATEMENT

There are pending in the District Court for the District of Columbia some 125 personal injury actions against Lockheed by minors suing through their adoptive parents. The first three of those cases to go to trial were *Schneider* v. *Lockheed*, *Zimmerly* v. *Lockheed*, and *Marchetti* v. *Lockheed*. Lockheed's appeals in those cases were treated as companions in the court of appeals, which reversed each of the judgments therein and remanded for new trials. In so doing, however, the court of appeals affirmed the district court's decision to tax as costs the fees of guardians *ad litem* appointed by the district court to represent the interests of all of the minor plaintiffs. This petition seeks review of that aspect of the ruling of the court of appeals.

A. The initial complaint

On April 4, 1975, during the evacuation of adults and Vietnamese orphans from Saigon, Vietnam, an airplane manufactured by Lockheed and owned and operated by the United States crash-landed in a rice paddy shortly after takeoff. (Pet. App. 5a-6a.) The troop compartment of the plane remained intact throughout the crash-landing and almost all of the passengers therein survived without noticeable injury. (*Id.* 6a.) Among the survivors were 150 Vietnamese orphans whose prospective

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[1] The court of appeals' May 19, 1981 judgment was issued promptly after oral argument (heard on May 12) as an aid to district court judges presiding over similar, pending cases (see Pet. App. 4a-5a & n.1). The court of appeals treated the date of its subsequent opinion, however, as the date from which the time in which to file petitions for rehearing ran.

adoption in Europe and the United States had been arranged by Friends For All Children, an adoption agency with an office in Colorado (hereinafter "FFAC"). (*Id.* 4a.)

On April 2, 1976, FFAC filed a complaint against Lockheed in the District Court for the District of Columbia, representing that it was the "legal guardian and next friend" of the children. The claim with respect to almost all of those children is that they suffered trauma that caused or would cause, not noticeable physical injury, but a syndrome of developmental problems generically classified as Minimal Brain Dysfunction and characterized by, among other things, learning difficulties, impulsiveness, and hyperactivity. (*Id.* 6a, 18a n.5.)

By the time that FFAC filed its complaint, all or nearly all of the children on whose behalf FFAC purported to sue were in the homes of their adoptive parents.[2] Few if any of those children and parents were aware that a suit had been filed on their behalf. (*Id.* 7a, 41a.)[3]

B. The appointment of the guardians *ad litem*

Some two years later, counsel for FFAC wrote a letter to the adoptive parents of the children, advising them of the existence of the suit and suggesting that the parents substitute themselves for FFAC as parties plaintiff. (*Id.* 7a.) The United States (against whom Lockheed had filed a third-party complaint) moved to have FFAC's counsel disqualified for improper solicitation of business, and Lockheed moved for summary judgment on the ground that FFAC was not an authorized "legal guard-

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[2] Ninety-five of the 150 children named in the complaint have been adopted by and live with their parents in Canada, France, Italy, Finland, Germany, Sweden, and other foreign countries.

[3] As the district court stated, "this case was filed as a single case in 1976 by [FFAC's] counsel without the leave of any client other than FFAC." (3/13/81 Tr. 27, 56.)

ian" or a proper "next friend" and therefore lacked capacity to sue on behalf of the 150 children. (*Id.*)

District Judge Oberdorfer *sua sponte* appointed Charles Work, Esquire, and the law firm of which he is member, Peabody, Rivlin, Lambert & Meyers, as *amici curiae* to advise the court, among other things, whether FFAC should be disqualified and whether the court should appoint a guardian *ad litem* to sue on behalf of the children. (*Id.*) The district court thereafter appointed Mr. Work and his law firm as guardians *ad litem*, directing them, *inter alia*, to give notice to the children's parents of their right to appear in this litigation by being substituted as parties plaintiff for FFAC. (*Id.* 8a.)[4]

C. The guardians' activities

The required notice was sent out on September 25, 1979. Many of the parents were reluctant to authorize the suits on behalf of their children to go forward. (*Id.* 41a.) The guardians made repeated efforts to persuade these parents to join the litigation, including making at least two trips to various European countries to meet with parents personally.[5] To date the parents of 115 of the 150 children on whose behalf FFAC sued in 1976 have substituted themselves for FFAC. Twenty of the remaining cases were dismissed on April 13, 1981, at which time the district court further extended the filing deadline for some 10 additional cases.

The parents of Michael Schneider, James Zimmerly, and Melissa Marchetti were substituted for FFAC in amended complaints filed in December, 1979. (*Id.* 8a.)

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[4] The district court denied both the Government's and Lockheed's motions, ruling that "[t]he appointment of Mr. Work thus cured for the present any lingering defects in FFAC's capacity * * *." (Pet. App. 62a.)

[5] Affidavit accompanying the guardians' most recent request for fees and expenses, described in note 10, *infra*.

Those parents retained the same counsel as had represented FFAC, on the same contingency fee basis. Thus, from then on the children in each case were (a) suing through their parents and (b) represented by counsel. Yet for the last two years the guardians *ad litem* have continued to participate in their cases, billing their regular hourly rates that, as explained below, the district court has charged to Lockheed as costs.

The activities engaged in by the guardians are perhaps best described in their opposition to a motion by Lockheed to restrict their role in the cases where the children are suing through their parents and represented by counsel chosen by their parents. Arguing in favor of a continued "broad mandate," the guardians urged (a) that it is necessary to have "an objective, informed observer and supervisor of this litigation" who "constantly analyz[es] events from the perspective of the impact on" the plaintiffs; (b) that the guardians had served "as a principal communicator" with the parents concerning the progress of the litigation, and "as a liaison and neutral buffer between" the parents and their retained counsel, "facilitating communications between them"; and (c) that it was "essential" that they "continue to serve as chief liason for communications between" the parents and their lawyers. In addition, they stated (d) that "[a]ll of these functions are best performed by one who is independent of" the plaintiffs' lawyers; (e) that it was "essential" that they continue "to oversee the lawyers and control the litigation" and to "participate in all settlement negotiations," and (f) that they should be generally "free to engage in any action to ensure that each child's individual interests are adequately protected." [6]

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[6] Memorandum * * * In Support of Opposition * * * To Defendant Lockheed Aircraft Corporation's Motion * * * For Definition of the Power and Duties of the Guardian, October 9, 1980, pp. 35-37. The district court denied Lockheed's motion.

Moreover, although the guardians had advised the parents in the notice-letter of September 25, 1979 that they were "not serving as attorney for the children," in fact the guardians performed extensive legal services in addition to as well as in coordination with those performed by plaintiffs' retained counsel. Indeed, the very first action by the guardians following their appointment was the submission of a brief opposing Lockheed's motion to certify (under 28 U.S.C. 1292) the district court's order appointing them.[7]

D. The district court's taxation of the guardians' fees as costs

The *Schneider*, *Zimmerly*, and *Marchetti* cases were tried *seriatim* to the same jury in early 1980. In *Schneider* and *Marchetti* the jury returned verdicts for the plaintiffs. In *Zimmerly* it returned a verdict for Lockheed. The district court assessed costs against Lockheed

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[7] In their most recent request for fees (see note 10, *infra*), the guardians state that over 2000 of the 5,443.3 hours charged through May 19, 1981, were devoted to legal research and the drafting of legal papers. The research included 387.2 hours ($31,307) on the question of payment of the guardians' fees; 223.6 hours ($18,125) on the issue of prejudgment interest; 170.9 hours ($13,182) on the issue of forum non conveniens; and 252.2 hours ($19,773) on "other" legal issues. Third Supplemental Affidavit accompanying guardians' motion for judgment, pp. 2-6 (Nov. 16, 1981).

Often appearing "Of Counsel," the guardians have drafted entirely or have participated in the drafting of numerous briefs in the district court, including (a) a motion for partial summary judgment filed February 14, 1980, (b) a motion for a settlement conference, (c) a motion for a single trial of the *Zimmerly*, *Schneider*, and *Marchetti* cases, (d) an opposition to Lockheed's motion to dismiss cases in which the adoptive parents refused to participate and to limit the role of the guardians, and (e) a motion for summary judgment on the issue of guardians' fees. In addition, in the district court the guardians have made dozens of apearances, including attending trials, and in the court of appeals they entered their appearances as counsel for the plaintiffs.

in all three cases and included fees and expenses of the guardians as costs. (Pet. App. 9a-10a.)[8] Subsequently the district court granted the plaintiffs in *Zimmerly* a new trial. That case was retried subject to a collateral estoppel order, entered by the district court on the basis of the plaintiffs' verdicts in *Schneider* and *Marchetti*, which prohibited Lockheed from contesting the issue of causation. At the close of that trial the jury returned a verdict for the plaintiffs. (*Id.*)

In *Schneider* and *Marchetti* the guardians sought compensation—at the normal billing rates charged by their law firm for services by legal personnel—in the amount of $128,238.50, representing 1448.1 hours worked by four partners, seven associates, and six law clerks. The guardians also sought $12,362.35 in expenses. Lockheed requested the district court to require the guardians to describe, other than in general terms, the nature of the work reflected by their hours. The guardians resisted on the ground that "[s]uch a detailed accounting would reveal to the defendant litigation strategy pursued by the plaintiffs."[9] The district court did not require an accounting but approved the bill of costs and taxed Lockheed $140,600.85 in guardians' fees and expenses. The court also taxed $24,848 in fees to Mr. Work and his law firm for their 314.4 hours logged as *amici curiae*, and related expenses of $429.49. (Pet. App. 38a.)

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[8] In September 1979, Lockheed and all plaintiffs had entered into a stipulation whereby Lockheed agreed not to contest liability for the happening of the crash and plaintiffs agreed to forego any claim for punitive damages. On the basis of Lockheed's entry into that stipulation the district court has ruled that all of the plaintiffs in this litigation are the prevailing parties for the purposes of cost awards under Rule 54, Fed. R. Civ. P., regardless of the outcome of any subsequent trial. (Pet. App. 8a, 74a.) Thus the district court awarded costs, including guardians' fees, to the plaintiffs in *Zimmerly* notwithstanding the jury's verdict in that case for Lockheed.

[9] Reply of June 24, 1980, to Lockheed's Opposition to Partial Bill of Costs, pp. 4-5.

In *Zimmerly* the district court taxed $404,814.21 in fees and expenses, representing a total of 4,198.3 hours of work by 26 lawyers and paralegals. (*Id.*) The award was cumulative of rather than in addition to the previous award. (*Id.*) It included compensation to the guardians for their services in connection with all of the original 150 purported plaintiffs, including the 20 whose complaints have been dismissed because the parents did not authorize their prosecution.

E. The court of appeals' decision

Lockheed argued on appeal that the award of *amici's* and guardians' fees as costs was unlawful because such fees are not listed in 28 U.S.C. 1920, which sets forth the items of costs that may be awarded. We relied on this Court's decisions in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), as having held that items not enumerated in Section 1920 may not be awarded as costs. The court of appeals did not mention either Section 1920 or *Roadway Express*. It distinguished *Alyeska Pipeline* as having involved attorneys' fees. (Pet. App. 39a, 41a.)

The court of appeals did reverse the award of the fees of the *amici curiae*, on the ground that their appointment resulted from doubts regarding FFAC's capacity to sue and its "questionable tactic of sending solicitation letters to the infants' parents." (*Id.* 40a.) Since the plaintiffs rather than Lockheed were responsible for the appointment of the *amici*, their fees could not be charged to Lockheed. (*Id.*) Although the appointment of the guardians—to "cure" FFAC's defects in representational capacity (see note 4, *supra*)—was also occasioned by the plaintiffs' rather than Lockheed's conduct, the court of appeals nevertheless ruled that the district court "did

not abuse its discretion in taxing costs against Lockheed for the guardian *ad litem* services performed up and through *Schneider*, *Marchetti*, and *Zimmerly II*." (Pet. App. 42a.)[10]

The result is that Lockheed has been relieved of the cost of paying for the services of Mr. Work and his law firm when they acted in the neutral capacity of *amici curiae*, but has been required to pay for those services as soon as and ever since they became Lockheed's adversaries.

REASONS FOR GRANTING THE WRIT

The decision below squarely conflicts with two recent decisions of this Court (as well as with decisions of other courts of appeals) ruling that items of expense that are not listed in 28 U.S.C. 1920 may not be taxed as costs. It also conflicts with the American Rule and numerous decisions of this Court forbidding awards of attorneys' fees. The Court should grant the writ, in the exercise of its supervisory powers, to reaffirm the prohibition against the taxation of nonstatutory fees and expenses and to end the differences in approach that now prevail in the lower courts.

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[10] As we noted above, the district court has ruled that all of the 130 plaintiffs are the prevailing parties for purposes of costs awards no matter what verdict the jury may return. (Note 8, *supra*; Pet. App. 74a.)

Subsequent to the court of appeals' decision, the guardians have moved the district court to award them approximately $500,000 in fees and expenses through May 19, 1981, representing 5,442.3 hours charged by 31 lawyers and paralegals. The May 19 date is the one after which, according to the court of appeals (Pet. App. 42a), the guardians must justify any fee requests with a showing that their activities were necessary to the individual plaintiff on whose behalf the request is made.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *ALYESKA PIPELINE* AND *ROADWAY EXPRESS*

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975), and *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), make it clear that only those items prescribed in Section 1920 of the Judicial Code may be recovered as costs. In *Aleyska Pipeline*, reversing an award of attorneys' fees as an item of costs, the Court noted that Section 1920 is traceable directly to the Act of February 26, 1853, ch. 80, 10 Stat. 161. In that Act, said the Court, Congress "undertook to standardize the costs allowable in federal litigation" and " 'to simplify the taxation of fees, by prescribing a limited number of definite items to be allowed * * *.' " 421 U.S. at 251, 251-52 n.24, quoting the remarks of Senator Bradley, Cong. Globe App., 32d Cong., 2d Sess. 207 (1853). The Act accordingly specifies "in detail the nature and amount of the taxable items of cost in the federal courts." 421 U.S. at 252.

The 1853 Act provided that the items listed therein " '*and no other compensation* shall be taxed and allowed.' " *Id.* 255-56 n. 29 (emphasis added). That language was not carried forward by the Revisers of the 1948 Code, "but nothing in the 1948 Code indicates a congressional intention to depart from that rule." *Id.* Fees and expenses of guardians *ad litem* are not mentioned in the statute.[11]

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[11] Section 1920 lists clerks and marshals' fees, court reporter charges, printing and witness fees, copying costs, interpreting costs, and the fees of court-appointed experts. (Pet. App. 75a.) The provisions for recovery of interpreting costs and the compensation of court appointed experts were added in 1978 to permit the recovery of special interpretation services provided under §§ 1827 and 1828 of the Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040, and the compensation of court-appointed expert witnesses under Rule 706 of the Federal Rules of Evidence. See H.R. Rep. No. 1687, 95th Cong., 2d Sess. (1978), *reprinted in* [1978]

In *Roadway Express* the Court held that the "costs" that are awardable under 28 U.S.C. 1927 against attorneys who unreasonably multiply the proceedings include only those items listed in Section 1920. The Court again noted that Section 1920 derives from the 1853 Act, by which Congress "approved a comprehensive measure setting the fees and costs for all federal actions." 447 U.S. at 759. "Above all," the Court said, in enacting the 1853 Act "Congress sought to standardize the treatment of costs in federal courts, to 'make them uniform—make the law explicit and definite.'" *Id.* 761 (quoting H.R. Rep. No. 50, 32d Cong., 1st Sess. 6 (1852)).

The fees that the lower courts had awarded as costs in both *Alyeska* and *Roadway* were attorneys' fees, but the rulings of those cases—that costs not included among those specified in Section 1920 (or some other statute)[12] may not be taxed—should have governed the case at bar as well, for guardian *ad litem* fees no less than attorneys' fees are not included in Section 1920.[13] Accordingly, in disregarding *Alyeska* and *Roadway* and approving the taxation of nonstatutory costs, the decision below both

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U.S. Code Cong. & Ad. News 4652, 4664. Neither of these amendments makes any reference to the taxation as costs of the fees and expenses of a court-appointed guardian *ad litem*.

[12] In other statutes, many of which are catalogued in *Alyeska*, 421 U.S. at 260-61 n.33, Congress has expressly provided for the recovery, as costs, of items not included in Section 1920. None of those statutes applies to this case.

[13] "Although [*Alyeska*] dealt directly with the propriety of awarding attorneys' fees as 'costs,' the thrust of the legislative history recounted in *Alyeska* suggests that specific statutory authorization is needed in order to authorize awards of any items as 'costs.'" *Wehr* v. *Burroughs Corp.*, 477 F. Supp. 1012, 1022 n.8 (E.D. Pa. 1979) *aff'd in relevant part*, 619 F.2d 276, 284-85 (3d Cir. 1980); *accord, Anderson* v. *Thompson*, 495 F. Supp. 1256, 1269 (E.D. Wisc. 1980), *aff'd*, 658 F.2d 1205 (7th Cir. 1981) (*Alyeska* established that "attorneys fees *and* items of costs, except those specifically allowed by 28 U.S.C. § 1920, may not be awarded * * *") (emphasis added).

conflicts with the decisions of this Court and defeats the uniformity sought by Congress in enacting Section 1920.[14]

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

In *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 284-85 (3d Cir. 1980), the court of appeals affirmed (with one insignificant exception) the district court's refusal to tax as costs certain items that are not included in Section

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[14] In *Franz* v. *Buder*, 38 F.2d 605 (8th Cir. 1930), involving a dispute over the ownership of an estate held in trust, the court of appeals ruled that a $5,000 guardian *ad litem* fee should be assessed, pursuant to the power of a district court sitting in equity, as costs against the trustees whose misbehavior had caused the controversy. Similarly, in *Panitch* v. *Wisconsin*, 451 F. Supp. 132 (E.D. Wisc. 1978), a civil rights class action by handicapped children seeking injunctive relief, the district court ruled that, sitting in equity, it could award $4,000 in guardian *ad litem* fees as part of the costs. In *Miron* v. *APCO Corp.*, 289 F. Supp. 915 (E.D. Wisc. 1968), the court also charged guardians' fees as costs, but assessed them against both parties in equal amounts of $350. Those decisions predate and are inconsistent with *Alyeska Pipeline* and *Roadway Express*. Beyond that, they are not authority for taxing the fees of the guardians against Lockheed in this case, an action at law where the appointment of the guardians was occasioned by the actions of FFAC.

In *Gandall* v. *Fidelity & Casualty Co.*, 158 F. Supp. 879, 882 (E.D. Wisc. 1958), the court noted that "the ordinary, general rule" is to award a guardians' fee "out of the fund recovered," but then rejected the argument that nonstatutory items may not be awarded as costs and followed Wisconsin law in assessing the guardians fees as costs against the losing defendant. We believe that decision to be wrong because it both (a) misconstrues Section 1920 and (b) mistakenly applies state law: The appointment of a guardian pursuant to Fed. R. Civ. P. 17(c) is a procedural matter governed by federal law in diversity cases, see *Donnelly* v. *Parker*, 486 F.2d 402, 406-07 (D.C. Cir. 1973), and federal law governs the taxation of costs. See *Conte* v. *Flota Mercante Del Estado*, 277 F.2d 664, 672 (2d Cir. 1960).

1920.[15] The district court had ruled that *Alyeska* "cautions that the expansion of the term 'costs' beyond those items statutorily authorized is inappropriate." 477 F. Supp. 1012, 1022 n.8 (E.D. Pa. 1979). In *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 224 (9th Cir. 1964), the court of appeals reversed the taxation of accounting fees as part of the costs on the express ground that the costs allowable under Section 1920 do not include such fees.

In *United States* v. *Pommerening*, 500 F.2d 92, 102 (10th Cir. 1974), the court of appeals rejected an expansive construction of Section 1920(3) and disallowed an item of costs because costs statutes "must be strictly construed and items to be taxed must be within the express language of the statute." And the Fourth Circuit, in *United States* v. *Vaughn*, 636 F.2d 921, 922 & n.1 (4th Cir. 1980), ruled that the "costs of prosecution" which may be assessed pursuant to 26 U.S.C. 7201 do not include investigation expenses because the latter are not included in Section 1920, which has generally been "strictly construed." [16]

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[15] The court of appeals allowed recovery for Lexis research. The case was one in which attorney's fees were allowed by statute, however, and the authority cited by the court of appeals indicates that Lexis expenses were essentially considered part of attorneys' fees.

[16] See also *White* v. *New Hampshire Dep't of Employment Security*, 629 F.2d 697, 702 (1st Cir. 1980), *cert. granted*, 68 L. Ed. 2d 839, May 18, 1981 (No. 80-5887). There the court held that attorneys' fees awardable under 42 U.S.C. 1988 must be included in the final judgment and are not to be taxed as costs, ruling that "the costs allowed as of course by Rule 54(d) and detailed in 28 U.S.C. § 1920 are * * * capable of being taxed by the clerk on one day's notice * * * [and] are almost all capable of routine computation * * *."

Other circuits have held, to the contrary, that Section 1988 attorneys' fees are to be treated as costs, with the result that a motion for such fees is timely even if filed outside the 10-day period for amending judgments provided by Fed. R. Civ. P. 59(e). *E.g.*, *Knighton* v. *Watkins*, 616 F.2d 795, 797-98 (5th Cir. 1980).

District court decisions in accord include *Richerson* v. *Jones*, 506 F. Supp. 1259, 1267 (E.D. Pa. 1981) (refusing recovery for items not listed in Section 1920); *Ginsberg* v. *Burlington Industries, Inc.*, 500 F. Supp. 696, 703 (S.D.N.Y. 1980) (costs "are limited to those described in 28 U.S.C. §§ 1911-29"); *Lockett* v. *Hellenic Sea Transports, Ltd.*, 60 F.R.D. 469, 471 (E.D. Pa. 1973) (costs statutes must be strictly construed and items to be taxed must be within the express language of the statute); *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 287 F. Supp. 143, 162 (D. Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969) ("Not every expense of litigation is recoverable. The items which 'may' be taxed are found in 28 U.S.C. 1920, 1921 and 1923."); *Braun* v. *Hassenstein Steel Co.*, 23 F.R.D. 163, 167 (D.S.D. 1959) (costs statutes must be strictly construed and items to be taxed must be within the express language of the statute).

The ruling of the court of appeals in the instant case that district courts have discretion to tax nonstatutory items conflicts with those decisions.[17]

III. THE DECISION BELOW CONFLICTS WITH THE AMERICAN RULE FORBIDDING THE AWARD OF ATTORNEYS' FEES

Throughout the course of the litigation below the guardians *ad litem* performed extensive legal services in coordination with as well as in addition to those performed by plaintiffs' counsel. (See p. 4 and n.5, *supra*.) Had those services in fact been performed by plaintiffs' counsel they could not rightfully have been charged to Lockheed's account. That is because, as many decisions of this Court have held, absent a statute or some

[17] See also *In re Fulwiler*, 624 F.2d 908, 910 n.3 (9th Cir. 1980), disapproving, on the ground that attorneys' fees are not listed in Section 1920, an earlier decision holding that the statutory authority of a bankruptcy court to award costs allowed an award of such fees.

recognized exception to the American Rule (none of which exists here), attorney's fees are not recoverable as costs or damages. *E.g.*, *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980) (the rule "requires every litigant to bear his own attorneys' fees"); *Alyeska Pipeline, supra*, 412 U.S. at 257; *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967).

Since in this case, however, the guardians are themselves lawyers, whose services have been held to be for Lockheed's account whatever the outcome of any subsequent trial, there is every incentive for the guardians to perform legal services that plaintiffs' counsel would otherwise have to perform. Other courts have recognized and guarded against such an evasion of the American Rule. Thus, *Franz* v. *Buder*, *supra*, forbade the recovery, as part of an allowance of guardian *ad litem* fees, of fees for legal services, ruling that the guardian's duty is to look "after the interests of his wards in the litigation to the same extent that an individual sui juris would ordinarily look after his own affairs," and that "[c]ounsel fees for representing the rights of an incompetent in litigation are no more costs of the action than are similar expenditures of litigants who are sui juris." 38 F.2d at 607.[18] The decision below allows the recovery of attorneys' fees even if called guardian *ad litem* fees conflicts with *Franz* and with all of the decisions of this Court affirming the American Rule.[19]

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[18] Similarly, the District of Columbia Court of Appeals, while allowing the recovery of guardian *ad litem* fees under a local court rule expressly authorizing such recovery in a child custody proceeding, took care to point out that the guardian—who was also a lawyer—"acted solely in his capacity as an investigator" and that "the compensation which he receive[d was] for his services as an investigator and it [was] not in the form of counsel fees." *Eaton* v. *Karr*, 251 A.2d 640, 642 (D.C. 1968).

[19] "[I]f a party is immune from an award of attorneys' fees as such, that immunity is not altered by taxing the fees as part of the costs. If the award is void in one form, it is void in the other."

IV. THE DECISION BELOW REFLECTS THE NEED FOR FURTHER GUIDANCE FROM THIS COURT REGARDING TAXABLE COSTS

1. Notwithstanding *Alyeska Pipeline* and *Roadway Express*, the lower federal courts continue to differ over the award of nonstatutory costs. In part that may result from uncertainty about the continuing validity of this Court's decision in *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227 (1964). There, noting "our national policy to minimize the costs of litigation" (*id.* 234), the Court upheld a district court denial of witness fees in excess of those allowed in 28 U.S.C. 1821. In so doing, however, the Court suggested in dicta that the district courts have discretion to tax "expenses not specifically allowed by statute." *Id.* 235.[20] *Farmer* has consequently been often cited (both before and after the decisions in *Alyeska Pipeline* and *Roadway Express*) for the proposition that district courts do have power to award nonstatutory costs. *E.g.*, *Illinois* v. *Sangamo Construction Co.*, 657 F.2d 855 (7th Cir. 1981); *Roberts* v. *S.S Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981).[21]

Jordan v. *Gilligan*, 500 F.2d 701, 705 (6th Cir. 1974), overruled on other grounds, *Weisenberger* v. *Huecker*, 593 F.2d 49 (6th Cir. 1979).

[20] *Farmer* was not cited in *Alyeska Pipeline* or *Roadway Express*.

[21] *Ex parte Peterson*, 253 U.S. 300 (1920), relied on by the district court, may also have contributed to the confusion. That case departed from earlier decisions that had construed the 1853 Act in the same fashion as *Alyeska* and *Roadway*. *E.g.*, *Trustees* v. *Greenough*, 105 U.S. 527, 5[illegible] (1882) ("[c]osts as between party and party" are "confined to the taxed costs allowed by the" 1853 Act); *United States* v. *Sanborn*, 135 U.S. 271, 282 (1890) ("The whole subject of fees in the courts of the United States is regulated by" the 1853 Act as dispersed through the Revised Statutes). In *Peterson*, however, the Court stated that "[t]he allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued," and approved the payment of auditors' fees as part of the costs because the 1853 Act did *not* mention such fees. 253 U.S. at 316, 317. Shortly there-

Other lower courts, however, in keeping with *Alyeska* and *Roadway* but in conflict with the cases upholding a discretionary power in the district court, have flatly disapproved nonstatutory awards. See the decisions of the Third, Fourth, Ninth, and Tenth Circuits, and of the district courts, cited at pages 12-14, *supra*, disallowing items because they were not listed in Section 1920 and holding that the statute must be "strictly construed."

The importance of the issue is highlighted by the Court's recent grants of certiorari in *White* v. *New Hampshire Department of Employment Security*, *supra* note 16, and in *Jones* v. *Diamond*, 636 F.2d 1364 (5th Cir. 1981), *cert. granted sub nom. Ledbetter* v. *Jones*, 69 L. Ed. 2d 970, 993 (1981). In *Ledbetter* the majority of the court of appeals directed the award of expert witness fees as part of the costs. 636 F.2d at 1382. The dissent objected that the award was without statutory warrant and was accordingly barred by this Court's decision in *Henkel* v. *Chicago, St. P., M. & O. Ry.*, 284 U.S. 444 (1932). *Id.* 1391. (Section 1821 of title 28 does not mention expert witness fees but allows only for specified fees of witnesses in general.) There is a conflict among the circuits on that issue. Compare *Adams* v. *Carlson*, 521 F.2d 168, 172 (7th Cir. 1975). On October 1, 1981, however, *Ledbetter* v. *Jones* was dismissed pursuant to Rule 53 of the Rules of this Court. 50 U.S.L.W. 3211.

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after, in *Sioux County* v. *National Surety Co.*, 276 U.S. 238, 241 (1928), the Court again reaffirmed that "costs in the federal courts are regulated exclusively by" the 1853 Act, citing *Sanborn*, *supra*, as authoritative and comparing *Peterson*. *Peterson* seems to us flatly inconsistent with *Sanborn*, *Sioux County*, *Alyeska* and *Roadway*. Its express holding has been superseded by enactment of Rule 53, Fed. R. Civ. P., but it nevertheless continues to be cited for the proposition that district courts have discretion to award nonstatutory costs.

2. The decision below provides a striking example of the results of the lower courts' disregard of this Court's teaching in *Alyeska* and *Roadway* in favor of a "roving authority" to tax nonstatutory items as costs. *Alyeska*, 421 U.S. at 260. It is not simply that the congressional goal of uniformity will be defeated if the definition of taxable costs differs from district to district and circuit to circuit. There is the added mischief that, once a court declares a fee or an expense associated with litigation to be a "cost," there arises the strong presumption that the losing party must pay it.[22] Yet the established practice of compensating guardians is to do so with an award out of the recovery the guardian helped to secure. *E.g.*, *Reed* v. *Bulman*, 244 F.2d 772 (D.C. Cir. 1957) (*per curiam*); *Mutual Life Insurance Co.* v. *Ginsburg*, 228 F.2d 881, 884 (3d Cir. 1956); *Folsom* v. *McDonald*, 237 F.2d 380, 381-82 (4th Cir. 1956); *Hunter* v. *Federal Life Ins. Co.*, 111 F.2d 551, 557 (8th Cir. 1940); 3A Moore's *Federal Practice* ¶ 17.26 at 17-283 (2d ed. 1979).[23] Had the courts below adhered to the "traditional rule" against the taxation of nonstatutory costs (*Alyeska*, 421 U.S. at 263), the disregard of that established practice would have been unlikely.[24]

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[22] *E.g.*, *Serna* v. *Manzano*, 616 F.2d 1165, 1167-68 (10th Cir. 1980); *Walters* v. *Roadway Express, Inc.*, 557 F.2d 521, 526 (5th Cir. 1977).

[23] Even plaintiffs' counsel considered that the guardians would recover their expenses from any fund recovered. (2/9/79 Tr. 67.) ("[A]nyone appointed guardian ad litem * * * [has] to look at the situation not only from the viewpoint of the possibility of compensation, which can only come, presumably, from the fund, but from the viewpoint of the time that has to be devoted. * * * And, therefore, it seems to me * * * [the guardians'] time is at risk unless there is a recovery.")

[24] There have been several funds generated by this litigation. As part of the September 1979 stipulations (see note 8, *supra*), Lockheed has paid $5,000 to each plaintiff upon the filing of an amended complaint substituting the parents for FFAC. (Pet. App. 8a.) In addition, in three cases that have been settled the district court has

The Rules of Civil Procedure authorize the district courts to appoint not only guardians under Rule 17(c), but also interpreters under Rule 43(f), masters (including auditors, assessors, etc.) under Rule 53, and expert witnesses under Fed. R. Evid. 706. The last three provisions permit the court to charge the fees of the appointees against one or both parties. By contrast, Rule 17(c) is silent on the subject of compensation of a guardian *ad litem*. That silence is consistent with (if not reflects) the fundamental difference between the role of the guardian and the role of the other appointees. The latter are neutrals, having no interest whatever in the outcome. The guardian, however, is a partisan—at least in a personal injury case such as this one—whose devotion to his ward's cause can be no less single-minded than an attorney's to his client's. Thus "[t]here is no more fitting manner" for payment of a guardian *ad litem* than by an award "out of the fund recovered by their services." *Folsom* v. *McDonald*, *supra*, 237 F.2d at 382.[25]

The decision below disregards the difference between a guardian and other appointments permitted by the

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set aside from the settlement funds $144,072 in guardians' fees. Finally, in recognition that the funds generated by the litigation are an appropriate source of fees, Mr. Work and his firm have moved the district court to award them the fees incurred in their role as *amici curiae* from the plaintiffs, out of funds produced either by settlements or judgments. Amicus Curiae's Motion for Payment of Fees and Expenses, November 25, 1981.

[25] In *Franz* v. *Buder*, *supra*, guardians' fees were assessed against individual trustees, rather than out of the fund, as punishment for the trustees' wrongful behavior. In *Panitch* v. *Wisconsin*, *supra*, an action for injunctive relief, there was no fund from which an award could have been made. In *Miron* v. *APCO Corp.*, *supra*, there is no indication whether a fund existed. In *Gandall* v. *Fidelity Casualty Co.*, *supra*, the court declined to follow what it acknowledged to be "the ordinary, general rule" that guardians' fees are recovered from a fund, ruling that a contrary state statute controlled. 158 F. Supp. at 882.

Rules and reaches the remarkable result that Lockheed need not pay for the services of Mr. Work and his law firm when they were acting in the neutral capacity of court-appointed *amici* but must pay for their services once they had been appointed as Lockheed's adversaries. The decision below is also remarkable in that it approves the award of fees even though

(a) the guardians' services were occasioned by the conduct of, and have benefitted, plaintiffs rather than Lockheed;

(b) those services were devoted in substantial measure to persuading people to sue Lockheed;

(c) the majority of those services have been undertaken *after* the parents of the children entered the litigation and retained their own counsel; and

(d) those services overlapped and supplemented the legal services ordinarily provided by retained counsel.

Those services are continuing: The district court calendar committee has directed that the 130 pending cases be tried *seriatim*, one per month. By charging those fees as an item of costs assessed against Lockheed the court below has substantially "reallocate[d] the burdens of litigation," *Alyeska Pipeline*, 421 U.S. at 247, notwithstanding that Congress has not "extended any roving authority to the Judiciary to allow [guardians'] fees as costs * * * whenever the courts might deem them warranted." *Id.* 260. This case, then, no less than *Ledbetter* v. *Jones*, *supra*, vividly demonstrates that, so long as there continues to be uncertainty among the lower federal courts regarding the propriety of taxing nonstatutory fees and expenses, the congressional goal of uniformity embodied in Section 1920 will be frustrated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

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81-1270

No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCKHEED CORPORATION,
Petitioner,

v.

MICHAEL MOSES SCHNEIDER, suing through his adoptive parents GARY and SANDRA SCHNEIDER, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-1844, 80-1960 & 80-2118

MICHAEL MOSES SCHNEIDER also known as NGUYEN PHI KHANH, a minor who sues by and through his next friends and adoptive parents, GARY and SANDRA SCHNEIDER, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,
Appellant

v.

UNITED STATES OF AMERICA

Nos. 80-1845, 80-1959 & 80-2119

MELISSA HOPE MARCHETTI also known as NGO THI HOA THUONG, a minor who sues by and through her next friends and adoptive parents, DENNIS and PAMELA MARCHETTI, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,
Appellant

v.

UNITED STATES OF AMERICA

Nos. 81-1200 & 81-1337

JAMES MATTHEW ZIMMERLY also known as DO PHI HUNG, a minor who sues by and through his next friends and adoptive parents, MELVIN E. and WANDA ZIMMERLY, *etc.*

v.

LOCKHEED AIRCRAFT CORPORATION
DEFT. AND THIRD PARTY PLTFF.,

and

THE UNITED STATES OF AMERICA
THIRD PARTY DEFT.,

Appellants

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 76-00544, 76-0544-1,
76-00544-1, 76-0544-3 and 76-00544-3)

Argued May 12, 1981

Decided June 17, 1981

Richard M. Sharp, with whom *William F. Sheehan*, *Nancy J. Bregstein*, and *Carroll E. Dubuc* were on the brief, for Lockheed Aircraft Corp., appellant in No. 80-1844 and cross-appellee in Nos. 80-1960 & 80-2118. *Aidan D. Jones* also entered an appearance for Lockheed Aircraft.

J. Vernon Patrick, Jr., with whom *William M. Cohn* was on the brief for Schneider, et al., appellees in Nos. 80-1844 & 80-2118 and cross-appellants in No. 80-1960. *Charles R. Work* also entered an appearance for Schneider, et al.

Thomas S. Martin, Assistant Attorney General, *Charles F.C. Ruff*, United States Attorney, *William Kanter* and *Linda Jan S. Pack*, Attorneys, Department of Justice, were on the brief, for United States of America, appellees in Nos. 80-1844 & 80-1960 and cross-appellant in No. 80-2118.

Richard M. Sharp, with whom *William S. Moore*, *William F. Sheehan*, *Patrick M. Hanlon* and *Carroll E. Dubuc* were on the brief, for Lockheed Aircraft Corp., appellant in No. 80-1845 and cross-appellee in Nos. 80-1959 & 80-2119.

J. Vernon Patrick, Jr., with whom *William M. Cohen* was on the brief for Marchetti, et al., appellees in Nos. 80-1845 & 80-2119 and cross-appellants in No. 80-1959. *Charles R. Work* also entered an appearance for Marchetti, et al.

Thomas S. Martin, Assistant Attorney General, *Charles F.C. Ruff*, United States Attorney, *William Kanter* and *Linda Jan S. Pack*, Attorneys, Department of Justice, were on the brief, for United States of America, appellee in Nos. 80-1845 & 80-1959 and cross-appellant in No. 80-2119.

William F. Sheehan, with whom *Richard M. Sharp*, *William S. Moore*, *Frederick C. Schafrick*, *Patrick M. Hanlon* and *Carroll E. Dubuc* were on the brief, for Lockheed Aircraft Corp., appellant in No. 81-1200 and cross-appellee in No. 81-1337. *Temple L. Ratcliffe & Aidan D. Jones* also entered an appearance for Lockheed Aircraft Corp.

Thomas S. Martin, Acting Assistant Attorney General, *Charles F.C. Ruff*, United States Attorney, *William Kanter* and *Linda Jan S. Pack*, Attorneys, Department of Justice, were on the brief, for United States of America, appellant in No. 81-1200.

J. Vernon Patrick, Jr., with whom *William M. Cohen* was on the brief for Zimmerly, et al., appellees in No. 81-1200 and cross-appellants in No. 81-1337. *Charles R. Work* also entered an appearance for Zimmerly et al.

Before BAZELON, *Senior Circuit Judge*, and MCGOWAN and ROBB, *Circuit Judges*.

Opinion for the Court *Per Curiam*.

Per Curiam: These personal injury actions arose from the explosive decompression and subsequent crash near Saigon, South Vietnam on April 4, 1975 of a Lockheed C5A Galaxy aircraft. The plane was carrying 258 Vietnamese orphans bound for adoptive homes in the United States and abroad. One hundred forty-four of the approximately 327 persons aboard the plane died; 150 orphans survived. One year later, Friends for All Children (FFAC), the nonprofit adoption agency that had originally arranged the flight, filed suit on behalf of the 150 surviving orphans against Lockheed Aircraft Corporation. FFAC claimed that Lockheed's negligence caused the explosive decompression and crash, which in turn caused extensive neurological disorders in the surviving children. Two years later, after much diligent work on the part of the District Court, procedures were developed for the orderly disposition of some 150 related trials. The first three cases were tried by the same trial judge to the same jury. After the third case was completed, the trial judge entered a Comprehensive Pretrial Order designed to govern the remaining related trials. The court then retried the second case, having granted plaintiff's motion for a new trial in that case pursuant to Rule 59(b), Fed. R. Civ. P.

These four trials and the Comprehensive Pretrial Order are the subjects of the appeals herein. Recognizing that our disposition of these cases bears heavily upon the remaining trials, some of which are now in progress

or already completed, we granted the District Court's request for expedited consideration. For the reasons set forth below, we reverse and order new trials in *Schneider, Marchetti, and Zimmerly.*[1]

I

A. "Operation Babylift"

In early 1975, the withdrawal of United States troops from South Vietnam was completed, and the conquest of Saigon by North Vietnamese troops was imminent. The United States Government, working in cooperation with FFAC, conceived of a plan whereby a number of Vietnamese orphans in Saigon orphanages would be flown from Saigon to the United States and there adopted by American families. As the conquest of Saigon became certain, plans for "Operation Babylift" went forward, and a Lockheed-manufactured C5A aircraft (normally used to transport troops and military equipment) was procured for the mission.

On April 4, 1975, approximately 301 passengers (including over 250 Vietnamese orphans) boarded the plane for the flight to the United States. Sixteen crew persons and ten medical personnel also were on the plane. Approximately 152 of the youngest children, primarily infants, were placed in the aft troop compartment and strapped two to a seat. Approximately 106 older orphans were placed in the lower cargo compartment.

---

[1] On May 19, 1981, we issued an order reversing *Schneider, Marchetti,* and *Zimmerly,* and disapproving certain aspects of the Comprehensive Pretrial Order. Our purpose was to halt any ongoing trials in which the judges might be relying upon these three cases or the collateral estoppel portion of the Comprehensive Pretrial Order. We explain our reasons for these holdings within, and, in addition, pass upon several other matters which we thought it unnecessary to reach in our order of May 19, 1981.

Fifteen minutes after takeoff, an altitude of approximately 23,000 feet, the aft ramp locking system of the aircraft failed, and the aft ramp, pressure door, and cargo doors fell off the aircraft, causing an immediate explosive decompression and a consequent loss of oxygen. The pilot turned back toward Saigon immediately, and crash-landed within 10 minutes. The plane first hit a rice paddy, then became airborne again for a brief period, and finally crashed into another rice paddy, skidding into a dike. At this point, the plane shattered into four large pieces and innumerable small ones. The cargo compartment was crushed and burned, killing nearly all of its occupants. The troop compartment remained intact, although it filled with smoke and fumes; 149 of its 152 orphan passengers survived. Helicopters arrived five minutes later and transported the surviving children to a hospital in Saigon. The next day, most of the orphans were flown to the United States and immediately examined at the Presidio hospital in San Francisco. They were then released to their adoptive parents.

B. Pretrial Proceedings

On April 2, 1976, FFAC filed a complaint in the United States District Court for the District of Columbia against Lockheed Aircraft Corp., representing itself as the legal guardian of 150 named Vietnamese children who had survived the plane crash. FFAC alleged that these children suffered from a syndrome of developmental problems generically classified as Minimal Brain Dysfunction (MBD), which had been proximately caused by the explosion and crash. FFAC charged Lockheed with negligence in the manufacture of the C5A, and grounded plaintiffs' right to recover in tort and breach of warranty.[2] Lockheed filed its answer on April 16, 1976,

[2] This case was assigned to the same District Court judge who had previously been designated by the Judicial Panel on

admitting that the C5A had crashed but disclaiming liability to the infants.

Lockheed then filed a Third Party Complaint against the United States, seeking to add the United States as a third-party defendant on the grounds that the United States' negligence had proximately caused the crash. In its Answer, the United States asserted that Lockheed, not the United States, had negligently caused the accident. In addition, the United States moved to dismiss, asserting that Lockheed's action was barred by 28 U.S.C. § 2680(k), which excepts claims arising in a foreign country from the scope of the Federal Tort Claims Act.

On January 6, 1978, a hearing was held on the motion to dismiss. The district court denied the motion. By later Pretrial Order, however, it granted, over Lockheed's objection, plaintiff's motion to offer as an evidentiary admission a statement made during that hearing by Lockheed's counsel (Plaintiff's Exhibit 109).

On Feb. 23, 1978, FFAC wrote to the adoptive parents of the plaintiffs, suggesting that the parents substitute themselves for FFAC as named plaintiffs in the present cases. Many of the parents had been unaware of the filing of any complaint. The United States moved to have FFAC's counsel disqualified for improper solicitation, and Lockheed moved for summary judgment on the grounds that FFAC lacked capacity to sue on behalf of the children. The trial judge appointed Charles Work, Esq., as *amicus curiae* to advise the court whether counsel for FFAC should be disqualified and whether a guardian *ad litem* should be appointed to sue on behalf of the children.

Multidistrict Litigation to handle FFAC's suit on behalf of the deceased orphans, but the new case was treated as a separate cause. *See In re: Air Crash Disaster Near Saigon, South Vietnam, on April 4, 1975*, 404 F. Supp. 478 (J.P.M.L. Nov. 5, 1978).

On the amicus' recommendations, the court denied Lockheed's motion for summary judgment. The court then appointed Mr. Work and his law firm to act in a more permanent capacity as guardians *ad litem*, thereby ameliorating any further ethical problems. At the direction of the court, the guardian informed the parents of all 150 surviving orphans of their right to substitute themselves as named plaintiffs. The parents of 98 of the children have so far exercised this right. Amended complaints were filed on behalf of Michael Schneider on Dec. 21, 1979, Melissa Marchetti on Dec. 21, 1979, and James Zimmerly on Dec. 20, 1979.

Throughout 1978 and 1979 the parties in all three cases engaged in extensive discovery. On Dec. 6, 1979, the parties entered into three stipulations. In the first, plaintiffs agreed not to seek punitive damages, and Lockheed agreed not to contest its liability for the accident in all cases in which amended complaints were filed by parents or guardians. The United States for its part agreed not to contest its liability to Lockheed for indemnification or contribution with respect to compensatory damage awards. Stipulation Nos. 1-3 of Sept. 14, 1979 (*Schneider* J.A. at 169-70).

The second stipulation provided that Lockheed would pay the guardians *ad litem* $5,000 for each legitimate plaintiff, to be used for medical treatment, litigation expenses, and other aids to the individual child. Stipulation No. 2 of Sept. 14, 1979 (*Schneider* J.A. at 167).

The third stipulation provided that Lockheed would pay to each plaintiff "the greater of (a) thirty percent (30%) of the amount of any . . . judgment or (b) fifty percent (50%) of the largest settlement offer . . . notwithstanding any appeal so taken." Stipulation No. 1 of Sept. 14, 1979 (*Schneider* J.A. at 167).

C. The Four Trials

The first case to go to trial was *Schneider v. Lockheed Aircraft Corporation.* The six-person jury found by special verdict that the explosive decompression and crash did not *cause* but did *aggravate* Schneider's MBD, and awarded Schneider $500,000 in compensatory damages. By order of April 22, 1980, as amended by Orders of July 16 and 18, 1980, the District Court awarded plaintiffs a judgment in the amount of $495,000 (reflecting the credit for the $5,000 already paid by Lockheed pursuant to stipulation 2), plus prejudgment interest totalling $102,358.77 and costs of $189,840.45.

The same jury decided the next case, *Zimmerly v. Lockheed Aircraft Corporation.* Zimmerly claimed damages for a condition called hydrocephalus as well as for MBD. One day before the case was scheduled to go to the jury, the parties settled the hydrocephalus claim, leaving only the MBD claim for the jury's decision. The jury held in favor of Lockheed, finding by special verdict that Lockheed neither caused nor aggravated any injury to Zimmerly.

In the third trial, *Marchetti v. Lockheed Aircraft Corp.*, a jury comprised of four original jurors plus two original alternates found by special verdict that the crash had caused MBD in the plaintiff, and awarded plaintiff $1,000,000 in compensatory damages. The District Court entered judgment against Lockheed for $995,000, plus prejudgment interest in the amount of $222,711.73 and costs (including amicus and guardian fees) of $195,600.40.

After the verdict in *Marchetti*, Lockheed moved for new trials in *Schneider* and *Marchetti.* Plaintiff moved for a new trial in *Zimmerly.* On July 15, 1980, the District Court granted plaintiff Zimmerly's motion for a new trial.

Before *Zimmerly II* could get underway, however, the District Court, on motion of another plaintiff in a related case, entered a Comprehensive Pretrial Order that collaterally estopped Lockheed to relitigate in any subsequent case the question whether the circumstances of the accident were sufficient to cause injury in the infant plaintiffs.[3] In practical terms, this Order precluded Lockheed from offering any evidence relating to the circumstances of the crash. Lockheed was restricted to arguing either that plaintiff's injury predated or postdated the crash, or that plaintiff was not injured at all.

Zimmerly II was tried in accordance with this pretrial order. The jury returned a general verdict for plaintiff Zimmerly in the amount of $400,000, which was later reduced to $395,000 by the judge and then augmented with a prejudgment interest award of approximately $120,192.05 plus guardian *ad litem* and amicus fees of $404,814.21.

Lockheed appealed all three cases, seeking as well the reinstatement of the jury's favorable verdict in *Zimmerly I*. Plaintiffs cross-appealed as to several of the District Court's rulings. We consolidated and expedited these cases for oral argument and decision.

II

Lockheed has urged reversal and retrial of these cases on numerous grounds including, *inter alia*, erroneous and prejudicial evidentiary admissions, discovery rulings, and jury instructions. Appellate courts are always re-

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[3] Plaintiff James Reynolds' case was originally scheduled as the fourth case to go to trial. Before *Zimmerly II*, Reynolds moved for a ruling *in limine* that would collaterally estop Lockheed to relitigate the question whether the circumstances of the crash were sufficient to cause injury. On Aug. 21, 1980, the court granted the motion, which became the basis of the Comprehensive Pretrial Order of Oct. 30, 1980.

luctant to disturb jury verdicts, especially in complex and time-consuming cases, and will do so only when prejudicial error has clearly occurred. Regretfully, we conclude that such was the case in all three of these trials. In our view, the admission of Exhibit 109 was prejudicial error requiring the reversal of *Schneider* and *Marchetti*, and undercutting the collateral estoppel ruling that was the predicate of *Zimmerly II*.

A. Admissibility of Exhibit 109

The plaintiffs in *Schneider*, *Marchetti*, and *Zimmerly I* introduced Exhibit 109 as an evidentiary admission by Lockheed to show that the infants were probably injured when the door left the airplane. The exhibit consisted of four pages from the transcript of a hearing held before the trial judge on January 6, 1978. The fourth page of Exhibit 109 contained the following statement by Lockheed counsel: "We also submit that these infants, without oxygen at 23,000 feet, probably sustained some injury at the time that this door left the aircraft." Exhibits, 64; *In Re: Air Crash Disaster Near Saigon, South Vietnam*, 476 F. Supp. 521 (D.D.C. 1979) (Tr. of Jan. 6, 1978: 142). From the procedural context and a reading of the full hearing transcript, we conclude that the above statement was inadmissible.

1. Procedural Context

Shortly after the initial complaint was filed on April 2, 1976, Lockheed filed a third-party complaint against the United States for indemnity and contribution "[i]f defendant and third-party plaintiff Lockheed is held liable for all or any part of the claims asserted against it" by the original plaintiffs. *See* Amended Third-Party Complaint, *Schneider v. Lockheed v. United States*, C.A. No. 76-0544-1 (D.D.C.). Lockheed contended that if any

injury to plaintiffs occurred as a result of the accident, such injury took place over international waters as well as in Vietnam, thus rendering the injury a maritime tort for which the United States could be liable under the Suits in Admiralty Act, 46 U.S.C. § 741 *et seq.* (Supp. III 1979). Amended Third-Party Complaint. The United States moved to dismiss the complaint, arguing, *inter alia*, that the injury, if any, occurred in Vietnam, and the third-party claim was thus barred by 28 U.S.C. § 2680(k) (Supp. III 1979), which excepts claims arising in a foreign country from the scope of the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* Motion of Third-Party Defendant United States of America to Dismiss.

Lockheed, in its Opposition to the Motion to Dismiss, noted that the issue before the court was a "jurisdictional bar under the Federal Tort Claims Act" and reiterated its claim that the United States was liable for a maritime tort. Moreover, in alleging injury to plaintiffs caused by the negligence of the United States, Lockheed stated that "[*f*]*or the purpose of deciding the issues raised in the motions pending before this Court*, the foregoing factual matters [*i.e.*, the allegations of the original complaint] must be *assumed* to be true." Opposition to the Motion to Dismiss. (emphasis added).

Oral argument concerning the above motions was held on January 6, 1978. The procedural context indicates that the relevant issue was whether injury to plaintiffs, if it occurred, took place over international waters, thus subjecting the United States to a tort claim. Injury was assumed *arguendo* for the purpose of determining third-party liability.

2. Transcript of the January 6, 1978 Hearing

Counsel for Lockheed and the United States made several statements during the hearing which indicate that injury was being assumed solely for the purpose of the

third-party motions. At one point, for example, counsel for Lockheed noted the factual assumptions underlying the hearing:

> MR. DUBUC: * * *
>
> One of the major issues, of course, remaining is this issue of indemnity. And I think we might take up the question of the Foreign Act or Foreign Country Exclusion which applies to all of the cases first.
>
> And, in connection with that, I would like to focus a little on the facts of the case. Now, these facts are derived from the two reports prepared and published by the United States Air Force. So, *for the purposes of this* [third-party] *motion, I assume that we can take them as accurate as far as the Air Force is concerned. For the purposes of ultimate liability* [*i.e.*, between plaintiffs and Lockheed], *of course, we may all have some differences.*
>
> THE COURT: But you wouldn't suggest that they are admissions?
>
> MR. DUBUC: I am just suggesting, for the purposes of this case, that they would certainly estop the Air Force from taking an opposite position.
>
> Furthermore, since these are motions of the Air Force in the way of judgment on the pleadings, as we have indicated, we assume that what we properly pleaded is taken as accurate *for the purposes of these motions.*

(Tr. 135) (emphasis added).

In short, the facts asserted during the hearing, and the accident reports from which they were derived, were assumed to be correct only for the purpose of arguing the third-party motions. Indeed, it can be seen from the preceding and following excerpts that estoppel and judicial notice refer to the Air Force's assessment as to where the alleged injury took place.

(MR. DUBUC): * * *

> Now, the cargo door which left the airplane was found and recovered by salvage operations on the high seas. Counsel has made reference in his argument to the fact that injury occurred in Vietnam. And we submit this set of facts, which is clear from the accident reports prepared by the Air Force . . . a large number of the Vietnamese orphans, were on the hangar deck, the cargo deck, strapped to the cargo deck, without oxygen and without seats. And we know from the report that at least one or two Air Force crew members departed the airplane because they were near the door at the time it occurred and that at least one or two others were injured on climbing on ladders and that sort of thing. We also submit that these infants, without oxygen at 23,000 feet, probably sustained some injury at the time that this door left the aircraft.
>
> So with respect to the argument on the issue as to whether or not this may or may not be a maritime tort, we think that might also be taken into consideration as a matter of fact, possibly judicial notice.

(Tr. 141-42).

We find that the statement was not an admission of injury by Lockheed.

3. The District Court Ruling

On March 4, 1980 plaintiffs filed a motion for a ruling *in limine* that the January 6, 1978 "admission" be admitted into evidence as a judicial admission. In its opposition to this motion, Lockheed correctly noted that

> [n]o concession of injury was intended but rather the statement constituted only a suggestion as to where the accident occurred for purposes of deciding conflicts of law questions, if there was indeed any injury at that time. . . . [T]he oft-quoted statement

> was made approximately one year before counsel for plaintiffs deigned to have any of the children examined, approximately two years before the results of those examinations were furnished to Lockheed, and more than two years before Lockheed was permitted to have these three plaintiffs independently examined. Thus, any comment made by counsel for Lockheed in January 1978 as to the infants' condition was, and could only be, considered an "assuming arguendo" comment. . . . Under no stretch of the imagination can this isolated sentence be considered an admission when all other factors are considered. . . . .

(Opposition Motion).

The court below, in a Final Pretrial Order issued on March 14, 1980, ruled that Exhibit 109 would be admitted as an evidentiary admission. The trial judge stated that the motion for leave to offer Lockheed's "statement on the record of January 6, 1978, that plaintiffs were injured is granted with the provision that the entire context be adduced simultaneously. It would be unfair to require defendant to wait for cross-examination or rebuttal to complete the context." (Order at 4).

Several other Circuits have previously held that statements made by a defendant in reference to a claim against a third party cannot be used as evidence by the plaintiff in the original action. *See, e.g., Douglas Equipment, Inc. v. Mack Trucks, Inc.*, 471 F.2d 222 (7th Cir. 1972); *Continental Insurance Co. v. Sherman*, 439 F.2d 1294 (5th Cir. 1971); *Gadaleta v. N-A Stoomvart*, 291 F.2d 212 (2d Cir. 1961). In *Continental Insurance Co.*, 439 F.2d at 1298, the court explained the rationale for excepting third-party pleadings from the general rule of admissibility:

> Strictly applied . . . [the general] rule would place a litigant at his peril in [that] . . . the allegations in third-party complaints and cross-

claims seeking recovery over in the event of liability in the principal action could be used in that action as admissions establishing liability. Thus, as a necessary exception to the general rule, there is ample authority that one of two inconsistent pleas cannot be used as evidence in the trial of the other.

We conclude that it was error for the trial judge to admit Exhibit 109 into evidence. The goals of efficient federal procedure would be frustrated if hypothetical pleadings from third-party proceedings could be introduced into evidence. Moreover, these purely contingent statements could not affect the probability of correctly determining whether the children were injured when the aircraft door blew off. They are therefore irrelevant.[4]

Once the court ruled that Exhibit 109 was admissible, there was no realistic cure available to Lockheed. The exhibit was repeatedly cited by plaintiffs' counsel during the trials as an "admission" of injury by Lockheed. To establish the statement's irrelevancy, Lockheed's counsel would have needed to explain to the jury the intricacies

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[4] Federal Rule of Evidence 401 reads as follows:

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 402 states:

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

of third-party liability, alternative pleading, the "foreign country exception" to the Tort Claims Act, and the jurisdictional foundations of the Suits in Admiralty Act. "Such an undertaking would have constituted a significant departure and might well have hopelessly confused the jury." *United States v. Pollock*, 394 F.2d 922, 926 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968). Such an explanation would also have been ineffective.

B. Prejudicial Effect in *Schneider* and *Marchetti*

When an error has been committed in the admission of evidence, such error is not ground for reversal unless it appears from the entire record that the complaining party may have been substantially prejudiced thereby, *i.e.*, that he suffered injury, was denied substantial justice, was prevented from or prejudiced in presenting his case on the merits, or had his substantial rights otherwise adversely affected by the error. *See Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *Palmer v. Hoffman*, 318 U.S. 109, 116 (1942). As the Court stated in *Kotteakos:*

> The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the [judgment] cannot stand.

328 U.S. at 765.

In view of the nature of Exhibit 109 and the use to which it was put, we find that substantial rights were affected by the error. Therefore, we reverse the judgments and order new trials in *Schneider* and *Marchetti*.

1. *Schneider*

The issues in the *Schneider* case were whether Michael Schneider suffered injury as a proximate cause of the accident and what compensation, if any, was warranted.

Schneider was an infant at the time of the accident; conflicting testimony placed him between ten and nineteen months old. Br. of Lockheed; A. 14-15. The plaintiff had spent most of his life in Vietnamese orphanages, where poor conditions may have caused physical and mental problems independent of the accident. Plaintiff's experts testified that the hypoxia, decompression, and impact trauma associated with the accident were sufficient to cause MBD [5] in the infants, while Lockheed experts testified that the conditions were insufficient to cause MBD. Plaintiff's experts also stated that Schneider was healthy prior to the accident, that he now has MBD and epilepsy which were caused by the tragedy, and that he will need remedial services and therapy into adulthood. Lockheed's experts countered that Schneider does not have MBD or epilepsy, that any developmental problems he does have are attributable to non-accident related conditions in Vietnam, and that he will not need significant remedial treatment in the future. Br. of Lockheed, at 11; A. 14-24.

After four days of deliberations, the jury returned a verdict for the plaintiff. The jury found by special verdict that the circumstances of the accident had not caused any new injury to Schneider but that they had aggravated a pre-existing injury. The enumerated causes of the aggravation found by the special verdict were "Explosive Decompression", "Hypoxia", "Impact", "Psychological Trauma", and "A Combination of the Above Factors". (*Schneider* J.A. at 364-65). The jury awarded $500,000 in compensatory damages divided into $100,000 increments for each of five categories: physical injury, past and future medical expenses, future educational

[5] MBD is a generic term employed to describe hyperactivity, chronic inattention, and other personality disorders. MBD can be caused by many conditions, such as malnutrition, hypoxia, dehydration, deprived family background, etc., and it is especially prevalent in adopted infants.

expenses, pain and suffering, and lost future earnings. (*Schneider* J.A. at 365).

Plaintiff's counsel mischaracterized Exhibit 109 during the trial and employed it in an attempt to discredit Lockheed's lawyer. The counsel introduced the exhibit by saying, "Next I want to read an admission, if it please the Court, Exhibit 109 . . . ." (Tr. 1242.). During cross-examination of a Lockheed aerospace medical expert who had testified that the accident could not have caused hypoxia, plaintiff's counsel inquired, "Now, were you aware that Lockheed had admitted that these babies had sustained an injury at the time of the explosive decompression?" (Tr. 2631). In his closing argument, plaintiff's counsel first stated that Lockheed's lawyer had "made mention in open court, while an argument was being made as to where the children were injured, that the children sustained some injuries at the time of the explosive decompression over the ocean." (Tr. 3750). This statement implied that the fact of injury had been conceded rather than assumed for the purposes of the third-party hearing. In rebuttal closing argument, plaintiff's counsel said to the jury:

> Did you hear Mr. Dubuc]Lockheed's counsel] explain why he told the judge that the children were injured over the ocean in the air when it was important for Lockheed to have that happen?
>
> * * *
>
> Did you hear a single word about that? Any explanation at all?
>
> * * *
>
> And I ask you to keep in mind whether it isn't now Lockheed's convenience to argue something else and tomorrow something different? They have a capacity to do so. . . .

(Tr. 3814-15).

By admitting Lockheed's statement that "these infants, without oxygen at 23,000 feet, probably sustained some injury at the time this door left the aircraft," the trial judge permitted the plaintiffs to (i) represent that Lockheed had earlier conceded the very fact which it was denying at trial and (ii) argue that Lockheed and its counsel were dishonest.

As noted above, the jury found that Schneider had suffered some pre-existing injury, but that the injury had been aggravated by both the decompression/hypoxia and the impact. Thus, the jury did not completely discredit Lockheed's testimony concerning pre-existing injury. It is impossible, however, to ascertain what role each of the evidentiary elements played in the jury's determination of the verdict. Exhibit 109 may have (1) convinced the jury that the effects of the impact were exacerbated by hypoxia; (2) influenced jurors to compromise in the overall verdict; (3) been treated by jurors as a conclusive admission on the critical question of injury; and (4) discredited much of Lockheed's case in the minds of the jury.

The attempts by plaintiff's counsel to employ Exhibit 109 in a manner prejudicial to Lockheed are obvious from the record. As the Court stated in *Kotteakos*,

> [i]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not swayed by the error, it is impossible to conclude that substantial rights were not affected.

328 U.S. at 765.

Because there can be no assurance that substantial rights were not affected by the alleged "admission" and the allegations of dissembling, we reverse and order a new trial in *Schneider*.

2. *Marchetti*

In the *Marchetti* case, the issues were again whether the plaintiff had suffered injury as a proximate cause of the accident and what compensation, if any, was required.

Melissa Marchetti was approximately thirteen months old at the time of the accident; like Schneider, she had spent her life in a Vietnamese orphanage. Marchetti had a history of illness prior to the accident, and at trial both sides agreed that she has MBD and is hyperactive. Br. of Lockheed, at 5-13. Lockheed's experts testified that Marchetti's problems are attributable to pre-accident factors, while plaintiff's experts stated that her condition was caused by the accident. Lockheed experts also asserted that Marchetti would need minimal remedial treatment in the future; plaintiff's experts testified that she would require substantial remedial therapy well into adulthood. *Id.*

After deliberating for ten hours, the jury found by special verdict that the circumstances of the accident directly caused injury to Marchetti. As in *Schneider*, the special verdict enumerated "Explosive Decompression", "Hypoxia", "Impact", "Psychological Trauma", and "A Combination of the Above Factors" as causes of injury. (*Marchetti* J.A. at 163-64). The jury awarded Marchetti $1,000,000 in compensatory damages which were allocated as follows: $416,000 for past and future medical expenses; $225,000 for future educational expenses; $139,000 for permanent injury; $116,000 for pain and suffering; and $104,000 for lost future earnings. (*Marchetti* J.A. at 164).

Exhibit 109 was mischaracterized and used to discredit Lockheed more extensively in *Marchetti* than in *Schneider*. Two of plaintiff's experts (Drs. Feldman and Malone) relied on the "admission" in concluding that the accident caused MBD in the plaintiff. Dr. Feldman

was asked by plaintiff's counsel "to assume that the Lockheed Corporation admitted in a legal argument that, at the time of the explosive decompression, that the children on that airplane sustained some injury." (Tr. 221). Dr. Malone was asked by the counsel "to assume the Lockheed Corporation admitted, as a fact, in the course of a legal argument before the Judge that at the time of the explosive decompression, that Lockheed submitted, that the children in the airplane sustained some injury." (Tr. 36-37). Dr. Malone stated that based on "the assumptions you have just asked me to hold," he believed that Marchetti's MBD was due in part to hypoxia. (Tr. 40-41). Moreover, plaintiff's counsel furnished its experts with a copy of the "admission" before trial, and Dr. Feldman referred to this "admission by Lockheed" four times during his testimony. (Tr. 78, 82-83). At one point, for example, Dr. Feldman stated that

> I am not an expert in aerospace medicine, but when Lockheed—and I am sure Lockheed knows something about aerospace—states that infants can be injured when the door blows off, that makes some sense to me. . . . I felt that the impact was more significant than the hypoxia. But it appears that Lockheed may feel that the hypoxia played a role.

(Tr. 78).

Because there was conflicting evidence at trial with respect to the effect of hypoxia, the above expert testimony based upon the mischaracterized "admission" was highly prejudicial.

Plaintiff's counsel also stated that Lockheed, its counsel, and its expert witnesses were lying because they refused to concede the injury previously "admitted" by Lockheed in Exhibit 109. Counsel said that "Lockheed wants us to believe the impossible. . . . This was a terrible accident and anybody that says it isn't is a liar" (*Marchetti* J.A. at 107). The counsel declared that he

had presented his own witnesses "to tell you the truth" (*Marchetti* J.A. at 115) and accused Lockheed of telling

> a gross lie. And the worst thing about it is that it's a lie about a little child, who got on that airplane—was put on there, and it's a disgrace. It is an absolute disgrace that they would come in and say such a thing.

(*Marchetti* J.A. at 118).

In his closing argument, plaintiff's counsel referred to Exhibit 109 several times. Counsel stated:

> Why would Lockheed say, why would Lockheed tell the Court in an admission that they submit that these children sustained an injury when the door blew off, that it wasn't true? If they were trying to persuade the Court of a legal argument at that time, and it wasn't true, why should we believe what they say now?

(Tr. 178-79).

In rebuttal summation, the counsel said:

> Members of the jury, I would just like to recall to your mind that Mr. Dubuc, throughout this trial, never once explained the admission—let me read you the conclusion of it. "We also submit that these infants, without oxygen at 23,000 feet, probably sustained some injury at the time this door left the aircraft."
>
> Why didn't he ever explain that to you? All sorts of scientific proof—Lockheed is a big aerospace company. That's what he told the Judge, and he tells you something different now. Why didn't he explain that * * *?

(Tr. 217-18).

The improper and prejudicial use of Exhibit 109 to influence expert testimony as well as to contradict and

discredit Lockheed was exacerbated by a portion of the jury instructions which may have led the jurors to treat the exhibit as a conclusive admission. The trial judge stated to the jury:

> A statement or argument of counsel is not evidence, and should not be considered as evidence, unless the statement is made as an admission or as part of a stipulation. In this case, you are instructed that the defendant, Lockheed Aircraft Corporation, does not contest its liability to compensate the plaintiff, Melissa Marchetti, for any compensatory damages which she sustained as a result of being on board the C5A aircraft on April 4, 1975, and that Lockheed admits that the plaintiff, Melissa Marchetti, was on board the C5A on April 4, 1975. *You should treat Lockheed's admissions and concessions as being true.*

(*Marchetti* J.A. at 134) (emphasis added).

Although the above instruction was proper, it may have influenced the jury to treat Exhibit 109 as an absolute concession of injury since the exhibit was mischaracterized throughout the trial as an "admission" by plaintiff's counsel and witnesses.

Several other aspects of the *Marchetti* trial have been cited by Lockheed as independent grounds for reversal: counsel's inflammatory summation, the District Court's erroneous instructions with respect to causation, and the size of the jury verdict. While we feel that these matters do not in themselves justify reversal, they did, in conjunction with the erroneous admission of Exhibit 109, irreparably taint the trial and strengthen Lockheed's case for reversal. Because these circumstances may recur on retrial, we discuss them briefly below.

Throughout his summation, counsel for plaintiff engaged in inflammatory remarks regarding Marchetti's injury which had little or no basis in the record. For example, counsel stated that even with remedial treat-

ment, "[s]he's going to be the girl that everybody calls weird, strange" (*Marchetti* J.A. at 111), said that "Lockheed has damaged this child in a way that money cannot repair", and asserted that Marchetti could not be helped even "[i]f you piled the money as high as the courthouse" (*Marchetti* J.A. at 112). Counsel exhorted the jury to contrast "a big aerospace company" with "a baby, a very fragile thing" (*Marchetti* J.A. at 117). In an appeal to the jury's conscience, the counsel pleaded "You've got to help us with the money . . . . [I]f you make a mistake, members of the Jury, there's no way you can correct it. You are going to have to live with it." (*Marchetti* J.A. at 112). These remarks invited the jurors to decide the issues of causation and damages based upon sympathy for an infant plaintiff and prejudice against a corporate defendant; the summation also alleged "facts" that were not properly in evidence.

An erroneous instruction invited the jury to reject Lockheed's defense. The judge stated in *Marchetti:*

> It is of no consequence that someone or some factor other than the defendant Lockheed may also have been at fault, may have been at fault in some manner or may have caused or contributed in some way to plaintiff's injury resulting from the accident.

(*Marchetti* J.A. at 146).

The trial judge was attempting to instruct the jury to disregard the possibility that the United States was also at fault. The formulation of the charge is so misleading, however, that it might reasonably have led to a juror to conclude that Lockheed's primary defense—pre-existing injury—was no legal defense at all. The jury instructions quoted above are erroneous and must be excluded or substantially clarified in any future trial.[6]

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[6] The judge gave a similarly erroneous jury instruction in *Schneider:*

> It is of no consequence in the circumstances that someone or some other factor than the defendant Lockheed

The verdict reached by the jury is also evidence of the effects of the prejudicial Exhibit 109, summation, and jury instructions. In determining whether a damage award is excessive, courts generally inquire whether the verdict is supported by the evidence adduced at trial. *Frank v. Atlantic Greyhound Corp.*, 172 F. Supp. 190, 191 (D.D.C. 1959); *Washington v. National Railroad Passenger Corp.*, 477 F. Supp. 1134, 1135 (D.D.C. 1979). The $1,000,000 award is not justified by the evidentiary record. The $641,000 award for medical and educational expenses, for example, is more than three times the highest figure suggested by *plaintiff's* experts as being necessary. Tr. at 238-39, 236-37. It is highly likely, therefore, that the jury was influenced by factors

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may have also been at fault in some manner or may have caused or contributed in some way to plaintiff's injury resulting from the accident.

(*Schneider* J.A. at 347).

As noted above, the judge's formulation of this instruction is erroneous, but it does not alone warrant new trials. The Supreme Court stated in Seaboard Air Line Ry. v. Padgett, 236 U.S. 668, 672 (1915) that "[w]hether the instructions could have produced misconception in the mind of the jury is not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied." The Court noted that even where instructions were contradictory, a charge which is otherwise explicit in explaining the law correctly can dispel the possibility of misconception." *Id.* In both *Schneider* and *Marchetti*, the trial judge repeatedly stressed in his instructions to the jury that it was to reach a verdict against Lockheed only if it found that the plaintiff had sustained injuries as a proximate result of the C5A accident. *See, e.g., Schneider* J.A. at 336, 342-43, 345-46; *Marchetti* J.A. at 124, 141-42, 145. It is uncertain from the entire charge that the jury was led astray.

other than a reasoned examination of the evidence in reaching this verdict.[7]

In summary, the use of Exhibit 109 in *Marchetti* was so unfairly prejudicial that the admission of the exhibit alone warrants reversal and a new trial. Also, because these issues may recur on retrial, we observe that an inflammatory summation by plaintiff's counsel and erroneous jury instructions may have contributed to an excessive verdict.[8]

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[7] On the other hand, Lockheed concedes that the $500,000 award in Schneider "did not exceed the plaintiff's evidence." Br. of Lockheed at 62.

[8] Lockheed also asserts that plaintiffs' alleged violations of pretrial discovery rules and orders in the *Schneider* and *Marchetti* cases deprived the defendant of a fair trial. Br. of Lockheed: (*Schneider* at 34-62); (*Marchetti* at 26-32). The alleged violations are: (i) plaintiff's failure to disclose the existence of a third normal electroencephalographic (EEG) test regarding Schneider during trial; (ii) plaintiff's failure timely to identify an expert witness in *Schneider;* and (iii) plaintiffs' failure to produce portions of the data underlying medical summaries regarding 34 orphans which were introduced into evidence in both trials. These alleged violations do not constitute grounds for new trials.

Although the Schneider EEG was not disclosed until the *Zimmerly I* trial, two normal EEG's were already in evidence and a third EEG would have been cumulative. While plaintiff's failure timely to disclose the third EEG is inconsistent with the spirit of the Federal Rules of Civil Procedure, the trial judge was within his discretion in concluding that the failure to produce the EEG did not deprive the defendant of a fair trial.

With regard to the alleged failure of plaintiff timely to identify the expert witness, Dr. Busby, in *Schneider,* we observe that Lockheed was notified more than forty days prior to the actual expert witness testimony that Dr. Busby would testify at trial. Br. of Schneider at 98-86. It cannot be said that the addition of Dr. Busby to the expert witness list three weeks before the commencement of the trial so un-

C. *Zimmerly I*

In *Zimmerly I*, the District Court set aside a jury verdict in favor of Lockheed and ordered a new trial pursuant to Fed. R. Civ. P. 59(b). The court found that the jury had been confused by two matters: first, an ambiguity in testimony with respect to peak versus average gravity forces ("G-forces") caused by the plane's impact; second, the last-minute settlement and withdrawal of plaintiff's claim for damages due to hydrocephalus. We uphold the court's action as falling within its discretion.

A trial court has wide discretion in setting aside a jury verdict where, as here, the motion granted is for a new trial, not judgment n.o.v.;[9] the court's decision

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fairly prejudiced Lockheed as to be grounds for a new trial As this court observed in *Washington Hospital Center v. Cheeks*, 129 U.S. App. D.C. 339, 341, 394 F.2d 964, 966 (1968), "we must assume Appellant's counsel was prepared to cross-examine all opposing expert medical witnesses on the expectation that they would testify consistent with the theory of Appellee's case."

Finally, plaintiffs' production of data regarding only 14 of the 34 orphans whose medical condition was summarized in trial exhibits did not so unfairly prejudice Lockheed as to require a new trial. Lockheed had been invited to join in the examinations of the children and had refused. The defendant had conducted depositions of plaintiff's medical experts and was informed therein that the doctors had found injury in all of the examined infants. In addition, Lockheed was given full opportunity during cross-examination to pursue its theory that the accident had not caused the alleged injuries. Br. of Schneider at 65-78; Br. of Marchetti at 34-38. Although the defendant was entitled to all of the data, we do not find that the trial judge's failure to order new trials because of the admission of the summaries was an abuse of discretion.

[9] *See* Luck v. Baltimore and Ohio R.R., 510 F.2d 663, 668 (D.C. Cir. 1974); Haber v. County of Nassau, 557 F.2d 322, 325 (2d Cir. 1977); Nodak Oil Co. v. Mobil Oil Corp., 553 F.2d 401, 410 (8th Cir. 1976).

concerns matters of fact, not law;[10] and the new trial is ordered because confusing testimony and events created a potential for injustice, not because the jury's verdict is against the weight of the evidence.[11] We have found no case in which a trial court has been reversed in these circumstances. Only the grossest abuse of discretion could justify reinstating the jury's verdict.

The parties contest responsibility for any confusion.[12] That controversy is beside the point, for the trial court's decision did not depend on a finding of fault. The only issue before us is whether the jury might have been confused. Like demeanor, confusion is more readily discerned by one in a position to observe the trial. Our failure to find confusion would not be dispositive. *See, e.g., Community National Life Insurance Co. v. Parker Square Saving and Loan Association*, 406 F.2d 603, 605 (10th Cir. 1969). Moreover, we find no basis for concluding that the jury was *not* confused.

The possibility of confusion must be considered in the context of this trial's novel procedure. Although evidence on G-forces was largely incorporated from the earlier *Schneider* trial, the witnesses' assumptions were in some instances unclear until the later *Marchetti* trial. At least one witness (Gibbons, *Schneider*, Tr. 2608) was asked to assume that the *peak* force of the crash was 1.6 G.

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[10] *See, e.g.*, Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933).

[11] *See* Reed Brothers, Inc. v. Monsanto Co., 525 F.2. 486, 499-500 (8th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976); Wood v. Holiday Inns, Inc., 508 F.2d 167, 175-77 (5th Cir. 1975); Lind v. Schenley Indus., Inc., 278 F.2d 79, 88-91 (3d Cir. 1960).

[12] Appellant, for example, argues (Br. at 28) that its hypothetical questions to its experts were not improper. Appellee (Br. at 18) implies that the trial judge improperly forced a settlement of the hydrocephalus issue.

Another witness (Quinn, *Zimmerly I*, Tr. 836) was asked to assume 1.4 G without qualification as to peak or average. A third witness (Wender, *Marchetti*, Tr. 97-99) was not asked to make an assumption about G-forces, but nevertheless inferred that the figures previously mentioned had represented peak forces. Lockheed asserts that both the trial judge and Dr. Wender were confused about the forces assumed in the hypothetical questions. Br. of Lockheed at 23 n.26. If the judge was confused, we have no difficulty believing that the jury was also confused.

Withdrawal of the hydrocephalus claim might also have caused confusion. Most of plaintiff's medical evidence involved hydrocephalus, either alone or in conjunction with MBD. The symptoms of the two conditions overlap, and the jury might well have been unable to evaluate evidence specifically relating to MBD, despite an instruction to do so. The task was made more difficult because general information about MBD was incorporated from the *Schneider* trial, whereas information about hydrocephalus was based on live testimony.

We therefore discern no grounds for rejecting the trial court's finding of jury confusion. Misunderstanding the central factual issues—the force of the landing and the medical symptoms—could have led to an unjust verdict for Lockheed. We note that the second *Zimmerly* trial resulted in a jury verdict for the plaintiff.[13] Such an inconsistency between two flawed trials does not show that either was unfair, but it does counsel caution in

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[13] In *Zimmerly II*, the jury necessarily found that plaintiff *does* suffer from MBD—a conclusion unaffected by the erroneous collateral estoppel ruling which causes us to set aside that verdict. This finding directly contradicts Lockheed's view of the evidence in *Zimmerly I*. Lockheed asserts that the G-force assumptions of its medical witnesses were unimportant in *Zimmerly I* because these doctors had examined James Zimmerly and found no MBD. Br. at 24.

attempting to choose between them. In view of our narrow scope of review, any doubt should be resolved in favor of the new trial.

D. *Zimmerly II*

The second Zimmerly trial (*Zimmerly II*) was governed by the Comprehensive Pretrial Order ["CPTO"] of Oct. 30, 1980. *Zimmerly* J.A. at 236. The CPTO incorporated the court's collateral estoppel order of Aug. 21,[14] which, based on the judgments in *Schneider* and *Marchetti*, prevented Lockheed from denying that the accident could have caused plaintiff's injuries. The CPTO further restricted the parties with regard to certain matters of proof.[15] The jury returned a verdict

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[14] Friends for All Children, Inc. v. Lockheed Aircraft Corp., 497 F. Supp. 313, 319 (D.D.C. 1980).

[15] The collateral estoppel ruling provided that:

> Neither Lockheed nor the Third-Party Defendant shall attempt to relitigate, reoffer evidence, or reargue, in the presence of the jury, whether there was insufficient hypoxia, force, psychological trauma, or explosive decompression in the troop compartment of the C5-A as to proximately cause neurological dysfunction (MBD) or proximately aggravate preexisting injury, disease, defect, or disability.

Friends for All Children v. Lockheed Aircraft Corp., 497 F. Supp. 313, 319 (D.D.C. 1980).

The Comprehensive Pretrial Order provided the following "scenario," which organized and limited the proof at trial as follows:

> 1. The jury would be read a stipulation of facts that will explain the circumstances of the C5-A crash. The parties may add to this statement pertinent detail, such as a verbal description of the manner in which plaintiffs were seated in the troop compartment, that is relevant to the nature or degree of injuries that plaintiffs may now suffer, including a photograph of a number of children strapped two to a seat.

[Continued]

[15] [Continued]

2. The trial court would supplement these statements with a preliminary instruction that (a) the Defendant Lockheed has agreed not to contest its liability for injuries resulting from the crash; and (b) the crash and the forces associated with it were sufficient to cause any brain injury, such as MBD, that plaintiff demonstrates that he now suffers.

3. Plaintiff's case in chief would be limited to evidence showing (a) that plaintiff now suffers or has suffered from mental defect, brain injury or other physiological injury; and (b) the amount needed to compensate plaintiff for the effects of such injury. Such evidence could be limited to such testimony as the reports of expert medical witnesses who examined plaintiff or medical records, school teachers, and expert economic or other testimony showing the amount required to compensate for or treat such disability. Evidence relating to the circumstances of the crash, including graphic testimony and visual descriptions of the crash and its aftermath, would be excluded.

4. Defendants, in their case in chief, could respond with evidence either that (a) plaintiff does not suffer from any injury, or that such injury does not require the compensation demanded by plaintiffs; and/or (b) some or all of plaintiff's present medical condition is the result of causes other than the crash.

5. If the defendant elected to attempt to prove that plaintiff's injuries were the result of an alternative cause, it could not introduce evidence tending to show that the crash was not sufficient to cause the injuries alleged, or adduce expert testimony based on that premise.

6. Additionally, if defendant elected to prove the existence of an alternative cause, plaintiff could, in rebuttal, introduce evidence—documentary, oral, or demonstrative—to prove that the forces associated with the crash were sufficiently severe that the crash was, more likely than not, the sole or substantial cause of plaintiff's injuries. This rebuttal evidence would be limited to

for the plaintiff. We find the application of collateral estoppel to be improper in the circumstances of this case. Accordingly, we remand for a new trial.

Our disposition of *Schneider* and *Marchetti* removes all basis for the CPTO as applied to *Zimmerly II* and subsequent trials.[16] The CPTO has been challenged on a variety of other grounds, however. The potential future use of collateral estoppel in the remaining cases requires that we address these arguments in the interest of sound judicial administration.

Lockheed first challenges the authority of the District Court, pursuant to the doctrine of *Erie v. Tompkins*, 304 U.S. 64 (1938), to impose collateral estoppel in the absence of mutuality between the parties.[17] Lockheed notes that the District of Columbia Court of Appeals has not abandoned the requirement of mutuality when collateral estoppel is used offensively—*i.e.*, by a plaintiff. We are directed to a footnote in *Gatewood v. Fiat*, 617 F.2d

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items received in the trials heretofore concluded, unless otherwise ordered by transferee Court.

7. Defendant should elect, at the time of the final pretrial conference before transfer, whether it will attempt to prove the existence of an alternative cause of plaintiff's injuries. This election which would not take place until completion of all discovery, should permit plaintiff to secure, if necessary, the presence of rebuttal lay witnesses who would otherwise not be required. *See* Memorandum of August 21, 1980, pp. 9ff. (Exhibit 1-T) and Order of September 18, 1980, as amended (Exhibits 1-U and 1-U-1).

Zimmerly J.A. at 274-76.

[16] Absent a valid judgment, collateral estoppel will not lie. *See, e.g.*, Montana v. United States, 440 U.S. 147, 152 (1980).

[17] In this Circuit, a federal court sitting in diversity must look to local law to determine whether collateral estoppel may be employed, *see* Gatewood v. Fiat, 617 F.2d 820, 826 n.11 (D.C. Cir. 1980).

820, 826 n.11 (D.C.Cir. 1980), in which we stated that the mutuality requirement should not be abandoned by a district court sitting in diversity until the local court has first taken that step. But *Gatewood* was decided before *Jackson v. District of Columbia*, 412 A.2d 948 (D.C. 1980), in which the District of Columbia Court of Appeals did permit the nonmutual application of collateral estoppel. Although the court in *Jackson* was obliged to rule only on a defensive estoppel, it approved in general terms the trend toward abandoning mutuality. It strongly intimated that it is prepared to follow the modern trend if the issue arises.[18] Commentators have noted that there is no difference in principle between offensive and defensive collateral estoppel.[19] We are therefore unwilling to say that courts in this Circuit may not dispense with the mutuality requirement in a proper case. *Cf. Carr v. District of Columbia*, No. 79-1571 (D.C. Cir., Dec. 18, 1980), slip op. at 1243.

Our statement in *Gatewood* does suggest that a district court should take special care in assuring that a case is appropriate for making this doctrinal change. An air crash case would seem to be a classic candidate for offensive and nonmutual collateral estoppel: *e.g.*, once it is established through adjudication that the defendant's negligence caused an accident, there are sound reasons for preventing him from relitigating that issue

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[18] The District of Columbia Court of Appeals cited with approval the leading authorities which have abandoned the mutuality doctrine in the context of offensive as well as defensive collateral estoppel, *e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Bernhard v. Bank of America, 10 Cal.2d 807 (1942); Restatement (Second) of Judgments § 88 (Tent. Draft No. 3, 1976). 412 A.2d at 952 n.9.

[19] *See, e.g.*, Reporter's Note, Restatement (Second) of Judgments § 88 at p. 170 (Tent. Draft No. 3, 1976). *Cf.* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

in subsequent cases.[20] But the subject of estoppel here is far different from the question of whether a course of conduct caused a single event. Here the question is whether an accident caused particular injuries to 150 separate persons. We find that each case raises a distinct factual issue.

The very heart of the collateral estoppel doctrine is the requirement that the issue to be precluded must be substantially the same as the issue previously litigated. *Montana v. United States*, 440 U.S. 147, 153 (1980). Delineating the proper scope of the estopped issue is often a difficult and delicate task. The court must weigh the burden of repetitious litigation against the risk of denying a party his day in court.[21] Many of the criteria we look to in determining "substantial identity of issues" have been met here:[22] evidence of the accident is the same for each case; the claims are closely related; the arguments and issues of law are virtually identical. But the cases are also different in one important respect: they involve different individuals, each with his own physical constitution and developmental history, and each alleging a particular set of symptoms caused by the accident.

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[20] *See* United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-29 (E.D. Wash., D.Nev. 1962), *aff'd in part sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379, 404-05 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964). Multiple claimant cases are also said to present a particular danger of unfairness in the use of nonmutual collateral estoppel, *see* Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN.L.REV. 281, 289 (1957). *But see* Currie, *Civil Procedure: The Tempest Brews*, 53 CAL.L.REV. 25, 34-36 (1965).

[21] *See* Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, 1977).

[22] *See* Carr v. District of Columbia, *supra*, slip op. at 19 n.47. Henderson v. Snider Bros., Inc., 409 A.2d 1083 (D.C. 1978); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, 1977).

To find causation, a jury must assess the circumstances of the accident as they might generally affect a child of a given age and susceptibility, and then relate that information to whatever injuries or problems it finds the specific child to have suffered. It is important to note here that MBD is not a readily identifiable ailment, but a syndrome of highly varied and indefinite symptomology. Although the circumstances of the accident are fixed from case to case,[23] the likelihood that the accident caused each particular set of symptoms could vary. A finding, for example, that the accident caused anxiety in one child would not show that it could have caused psychomotor seizures in another.

In making its decision, the jury would typically rely on medical evidence in conjunction with information about the accident. Physicians who had examined the child might testify as to the probability that *this* accident caused *this* child to suffer *this* set of symptoms. The fate of other passengers would be probative, but not dispositive. And a reasonable trier of fact could, without contradiction, find for the plaintiff in one case and for the defendant in another.

Here, the collateral estoppel ruling alone did not wholly foreclose the issue of causation. It determined only the issue of whether the circumstances of the accident were *sufficient* "to proximately cause neurological dysfunction (MBD) or proximately aggravate preexisting injury, disease, defect or disability." *Zimmerly* J.A. at 210, 215. By its terms, the estoppel ruling would have prevented Lockheed only from contending that "*no* individual" could have suffered any form of MBD as a result of the accident. Such an estoppel, although proper, would have had limited value in avoiding repetitious litigation. But the CPTO went much further than this narrow es-

[23] There was no evidence regarding the location of each individual within the plane.

toppel. The crash was deemed sufficient to cause *every* form of MBD in *every* plaintiff.[24]

The CPTO made the defendant responsible for any injury or defect which could not be shown to have another cause. Lockheed was thereby denied its day in court on an issue which was not adjudicated in any previous proceeding: whether the crash could have caused the particular injuries claimed by Zimmerly.

In vacating the CPTO here, we do not suggest that appropriate collateral estoppel orders cannot be framed in these or other cases. Nor do we intend otherwise to discourage the district courts or the parties from simplifying the proof offered at trial. We believe, however, that the courts must be wary of the significant differences among these cases before restricting the proof in future trials.

III

In addition to the above, Lockheed has raised several contentions which, if meritorious, would not require reversal but only adjustment in the amount of costs or interest taxed against Lockheed. Since we conclude above that the judgments in all three cases must be set aside, we are not compelled to reach either party's contentions as to the proper calculation of costs or interest. We are mindful, however, that these same questions will probably arise on a subsequent retrial or appeal of any one of the related cases pending in the District Court. Therefore, we address each of Lockheed's contentions in turn.

A. Taxation of Amicus and Guardian Fees Against Lockheed

The circumstances surrounding the appointment of the amici and guardians *ad litem* have already been set forth

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[24] *See* note 15 *supra*. In the event Lockheed attempted to prove an alternative cause for a child's MBD, the plaintiff would be permitted to introduce evidence of the crash scene.

above. The actual duties performed by Mr. Work and his firm in these capacities, however, deserve further comment.

In his capacity as amicus curiae, Mr. Work was primarily responsible for ascertaining whether FFCA should continue to represent the infant plaintiffs or whether the appointment of a guardian *ad litem* would be preferable. After recommending the latter course, Mr. Work and his firm were appointed guardians *ad litem*. During the period preceding the parents' entry into the litigation, the guardians performed a significant service to the court by notifying parents and coordinating litigation efforts. Even after numerous parents had been brought into the litigation, the guardians continued to oversee the litigation, participate in settlement discussions, and negotiate stipulations. In *Schneider*, the court awarded the guardians *ad litem*/amici total costs of $145,845.31, allocated as follows: amicus fees, $24,848.00; guardian fees, $109,185.00; amicus expenses $429.49; guardian expenses, $11,380.82. *Schneider* record at 181. The subsequent awards in *Marchetti* and *Zimmerly II* were cumulative, representing the prior awards plus additional guardian *ad litem* costs and expenses. In *Marchetti*, the total award was $165,878.34, allocated as follows: amicus fees, $24,848.00; guardian fees, $128,238.50; amicus expenses, $429.49; guardian expenses, $12,362.35. *Marchetti* record at 180. In *Zimmerly II*, the court awarded total costs of $404,814.21, allocated as follows: guardian fees, $367,387.50; guardian expenses, $37,426.71. *Zimmery II* record at 280. Our task on appeal is to determine whether the District Court's award of fees against Lockheed for services done by Mr. Work and his firm in either of their capacities represented an abuse of discretion.

1. Amicus Curiae Fees

The traditional rule regarding compensation of an amicus curiae is that "where the court appoints an

amicus curiae who renders services which prove beneficial to a solution of the questions presented, the court may properly award him compensation and direct it to be paid by the party responsible for the situation that prompted the court to make the appointment." 4 Am. Jur. 2d, Amicus Curiae § 7 (1969) (citations omitted). *Accord, In re Phi Father Education Assoc.*, 309 S.W. 493 (1957); *In re Mortimer*, 358 N.E. 2d 92 (Ill. App. 1976); *McCoy v. Briegel*, 305 S.W. 2d 29, 39 (Mo. App. 1957).

Lockheed contends that the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), altered the traditional rule, but we feel this is a misapplication of the *Alyeska* case. In *Alyeska* the Supreme Court held that federal courts may award attorney's fees only upon specific statutory authorization. *Alyeska* does not speak to the present case, which involves fees allegedly owed to an expert appointed by the court. "Amicus curiae is technically a 'friend of the court,' as distinguished from an advocate. It arises only via an ex parte order of the Court and fully advises the Court on the law in order that justice may be attained." *Allen v. County School Board of Prince County*, 28 F.R.D. 358, 362 (E.D. Va. 1961).

Two conditions must be satisfied before amicus fees may properly be assessed against the losing party: first, the court must "appoint[] an amicus curiae who renders services which prove beneficial to a solution of the questions presented." 4 Am. Jur. 2d, Amicus Curiae § 7. In light of the complexity and unwieldiness of the questions confronting the court at the time the amicus was appointed, we do not doubt that the amicus in this case fulfilled the first portion of this requirement.

The second is more problematic: the court may then "direct it [the fee] to be paid by the party responsible for the situation that prompted the court to make the appointment." In this case, the court appointed the

amicus initially in response to Lockheed's motion for summary judgment. But it was FFAC's questionable tactic of sending solicitation letters to the infants' parents that prompted Lockheed's motion for summary judgment. Because of these *two* events, the District Court felt compelled to appoint an amicus to advise the court on the resolution of the issues relating to FFAC's capacity to sue.

We cannot conclude, then, that in this case amicus costs were assessed against the proper party. Unless we assume that the party who alerts the court to a potential ethical problem creates that problem, we cannot find that Lockheed created the thorny issues which required the services of Charles Work. Accordingly, we find that any taxation against Lockheed of the amicus curiae fees is contrary to clear legal precedent and inappropriate in these cases.

2. Guardian *Ad Litem* Fees

Lockheed contends that the trial court erred as well in including in the costs award the fee of the guardian *ad litem*. Appellant does not question the court's authority in appointing a guardian for the infant plaintiffs, *see* Fed. R. Civ. P. 17(c), or in awarding a fee, *see, e.g., Mutual Life Insur. Co. v. Ginsburg*, 288 F.2d 881 (3d Cir.), *cert. denied*, 351 U.S. 979 (1956). Instead, appellant challenges the assignment of the fee as costs, rather than as an award to be paid out of appellees' recovery to the guardians *ad litem*. In any case, Lockheed contends, it cannot be taxed for guardian fees attributable to the period subsequent to the entrance of the parents as next friends of the infant plaintiffs, or for fees incurred for purely "legal activities" such as legal research and LEXIS time.

Appellant recognizes that the award of guardian fees as costs is not without precedent in the federal, *see Franz v. Buder*, 38 F.2d 605 (8th Cir. 1930); *Panitch*

v. Wisconsin, 451 F.Supp. 132 (E.D. Wisc. 1978), or the local courts, *see Eaton v. Karr*, 251 A.2d 640 (D.C. App. 1969). Appellant suggests, however, that such an award was inappropriate here for two reasons. First, the guardian's fee included compensation for legal services. According to appellant, the award therefore violates the rule of *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), which proscribes awards of attorneys' fees absent specific statutory authority. Second, the guardian's tenure overlapped with the appearance of appellees' adoptive parents. According to appellant, the guardian was thus performing services beyond the contemplation of Fed. R. Civ. P. 17(c), at least as of Dec. 22, 1979.

In our view, appellant construes too narrowly the role of a guardian *ad litem*. Unlike the private attorney in *Alyeska*, a guardian is not simply counsel to one party in the litigation, but instead plays a hybrid role, advising one or more parties as well as the court. 3A Moore's Federal Practice ¶ 17.26 (1978). *See United States v. E.I. Dupont de Nemours & Co.*, 13 F.R.D. 98, 104-05 (N.D. Ill. 1952); *Richardson v. Tyson*, 110 Wis. 572, 578, 86 N.W. 250, 251 (1901). The guardian's responsibilities must necessarily differ with each particular case, and the court is therefore accorded wide discretion in shaping his role.

In this case the record suggests that the trial court did not abuse its discretion in compensating the guardian for "legal" expenses or expenses incurred after the parents were brought into the litigation. As appellant recognizes, this litigation presents difficult problems of representation. The case was instituted shortly after the infants were installed in new homes throughout the world. As a result, a significant expenditure of time and funds was necessary before the parents could be located and a manageable trial procedure developed. Even then, the record suggests that some adoptive parents were wary of invitations to join the lawsuit.

Under the circumstances, the court appropriately gave the guardian wide power to monitor, investigate, and report on, *inter alia*, possible conflicts within and among the involved families. Some of these responsibilities reasonably included legal research and analysis. Thus, the cost award was not simply another "form" of the practice banned in *Alyeska*, *compare Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974). Instead, the allowance of legal expenses was within the trial court's discretion in permitting the guardian to meet his extensive obligations to the court. For the same reasons, we decline to disturb the trial court's decisions to continue the guardian's service after the arrival of the adoptive parents and to compensate the guardian accordingly. The trial court is best positioned to ascertain when the circumstances requiring the guardian's original appointment—the potential conflicts of interest, etc.—are such that the guardian's services are no longer required.

We conclude that the District Court did not abuse its discretion in taxing costs against Lockheed for the guardian *ad litem* services performed up to and through *Schneider*, *Marchetti*, and *Zimmerly II*. Although Lockheed has argued that there currently exists no check upon the guardian, we think that the court's scrutiny of the fee requests has been an adequate check under the circumtsances, up to this point. With many of the parents now intimately involved in the litigation, it may become increasingly difficult for the court to discern each individual plaintiff's need for the guardian's services in each particular case. Therefore, for all services rendered from the date of this judgment forth,[25] the guardian should be required to show that the particular plaintiff had need of the particular services for which the guardian seeks a fee. This record will facilitate the court's supervision of the guardian's fees.

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[25] The date of judgment is the date on which we issued our Judgment with an opinion to follow, May 19, 1981. *See* note 1 *supra*.

B. Prejudgment Interest

Plaintiffs were awarded prejudgment interest of $102,358.77 in *Schneider*, $222,711.73 in *Marchetti*, and $120,192.05 in *Zimmerly II*. Lockheed contends that an award of prejudgment interest in a tort action is impermissible under District of Columbia law. We agree.

A federal court sitting in diversity must look to local law to determine the availability of prejudgment interest. 28 U.S.C. § 1961 (Supp. III 1979). *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497 (1941); *In re Air Crash Disaster Near Chicago, Ill.*, No. 80-1975 (7th Cir., Feb. 17, 1981), slip op. at 6. The federal courts "are not free to devise a different measure of damages pursuant to [their] 'general equitable powers,'" *In re Crash*, slip op. at 7. The local law applicable in these cases is that of the District of Columbia. *In re: Air Crash Disaster Near Saigon, South Vietnam on April 4, 1975*, 476 F. Supp. 521, 529 (1979).

15 D.C. Code § 109 (1973) provides:

> In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of judgment only. This section does not preclude the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. In an action to recover damages for a wrong the judgment for the plaintiff shall bear interest.

[As added Aug. 30, 1964, 78 Stat. 677, Pub. L. 88-509, § 3(b)(1).] This section generally limits interest to the postjudgment period. The second sentence appears to provide an exception. It is unclear, however, whether the exception refers only to contract actions specified in the first sentence, or to both contract and tort actions. The location of the second sentence in the paragraph, followed by the provision in the third sentence that the *judgment* shall bear interest in tort actions, suggests

that the exception applies only to contract actions. Our interpretation is confirmed by the statute's legislative history and by the case law.

At common law, judgments in the District of Columbia did not bear interest, regardless of the nature of the cause of action. *Washington and Georgetown R.R. v. Harmon's Administrator*, 147 U.S. 571, 584-85 (1893). Congress, by the Act of March 3, 1901, altered the common law. The language of the Act was virtually identical to that appearing today in section 15-109:

> In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only; but nothing herein shall forbid the jury, or the court, if the trial be by the court, from including interest as an element in the damages award, if necessary to fully compensate the plaintiff. In an action to recover damages for a wrong the judgment for the plaintiff shall bear interest.

[Act of March 3, 1901, ch. 854, § 1185, 31 Stat. 1378.]

Thus, since 1901, judgments in actions "to recover damages for a wrong," along with actions founded in contract, have carried postjudgment interest from the judgment as a matter of right in the District of Columbia. The 1901 legislation maintained, however, the traditional distinction between actions in contract and those in tort, at least with respect to prejudgment interest. While the Act provided for prejudgment interest in actions founded in contract, it did not do so in tort cases.

The current provision, section 15-109, is simply a reenactment of the original 1901 legislation. In the process of codification in 1964, the first sentence of the earlier version was split in two. Thus, where the prejudgment interest clause previously was part of the same sentence as the contract provision, separated only by a semicolon, it now stands as a separate sentence. There is no reason

to believe that Congress intended any substantive change from the rule against prejudgment interest in tort actions by this alteration of punctuation in 1964.[26] Nor is this change in punctuation the "plain and unambiguous" expression of legislative intent that is required under "settled rules of construction" before Congress will be deemed to have changed the common law principle precluding prejudgment interest in tort actions. *Harmon's Administrator*, 147 U.S. at 587.

We also note that there is a conspicuous absence of any reported tort case in the District of Columbia since the original enactment of the 1901 legislation that even mentions, much less awards, prejudgment interest. While this fact is not determinative, it certainly recommends, along with the legislative history of section 15-109, the conclusion that we have reached.

In summary, we hold that neither common law nor the District of Columbia Code provides for the award of prejudgment interest in tort actions in the District of Columbia.

C. September 14, 1979 Stipulation

Lockheed argues that the District Court incorrectly interpreted the stipulation of September 14, 1979 entered into by defendant and the plaintiffs. *See Schneider* J.A. at 166-68. The paragraph in question states that "Lockheed shall . . . pay to counsel for the plaintiff the greater of (a) thirty percent (30%) of the amount of such *judgment* or (b) fifty (50%) of the largest settlement offer . . . notwithstanding any appeal so taken." *Schneider* J.A. at 167 (emphasis added). Lockheed contends that the term "judgment" should be read to exclude the fees and costs of the guardian *ad litem* and

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[26] *See, e.g.*, King v. United States, 379 U.S. 329, 336 (1964) (division in revised statutes of previously unified provision into separate sections "did not work any change in the purpose or meaning") (citation omitted).

amicus curiae, as well as the amount awarded by the District Court as prejudgment interest.

While we find the award of prejudgment interest impermissible and the taxation of *amicus* fees as costs against Lockheed error, we nonetheless hold that the language of the September 14, 1979 stipulation does not compel reduction of the judgment to eliminate those expenses properly awarded as costs. We therefore conclude that the District Court did not abuse its discretion in interpreting the application of the thirty-percent provision in the September 14, 1979 stipulation to include those items properly labeled as costs.

IV

Appellees have raised several matters on cross-appeal which deserve some mention. All three appellees challenge the court's computation of prejudgment interest, asserting that it should have been computed from the date of the accident and not the date selected by the District Court. Inasmuch as we hold herein that prejudgment interest was unavailable in these cases in any event, however, the cross-appeals are mooted.

The remaining cross-appeals were raised primarily by James Zimmerly, and were conditioned upon this court's reversal of the three trials. They involve challenges to (1) one section of the Comprehensive Pretrial Order which excludes pictures and newsreels of the crash scene, (2) other evidentiary rulings, (3) the propriety of the settlement that occurred during *Zimmerly I*, and (4) the court's computation of postjudgment interest in *Zimmerly II*. To our mind, it would be inappropriate for this court to pass upon those questions at this point in the litigation. The District Court rulings now being appealed were clearly premised on the unique facts of the three cases, now reversed and remanded for new trials, and on the Comprehensive Pretrial Order allowing collateral estoppel, also reversed in this opinion. In

light of our holdings today, the court will undoubtedly reconsider many of its evidentiary and other rulings *sua sponte*, and the appellees will be free to address their complaints to that court. We hold that these cross-appeals are properly addressed to the district court that retries *Schneider*, *Marchetti*, and *Zimmerly*.

V

We have attempted in this opinion to resolve many of the complex legal questions presented by these cases, both for the purpose of settling the instant disputes and as a guide for courts confronted with related cases in the near future. Although this opinion will, in practical terms, require the retrial of several cases, it is our hope that the setting forth of our views on many of these questions will speed these cases to swift and proper resolution.

In conclusion, we reverse and remand *Schneider*, *Marchetti*, and *Zimmerly* for new trials, on the grounds that the admission of Exhibit 109 in *Schneider* and *Marchetti* was prejudicial error in both trials and fatal to the collateral estoppel order that was the foundation of *Zimmerly II*. We also find that the Comprehensive Pretrial Order of Oct. 30, 1980, is invalid inasmuch as it prevents Lockheed from presenting evidence showing that the accident was insufficient to cause MBD in the infant plaintiffs.

As to the proper calculation of costs and interest in these cases, we hold that the guardian *ad litem* fees were properly allowed by the District Court and may be awarded in the future under the conditions set forth herein. The amicus fees and prejudgment interest were, in our view, improperly taxed against Lockheed. Last, we hold that the Stipulation of Sept. 14, 1979 allows these plaintiffs to retain thirty percent of the total District Court judgment.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 76-00544 and No. 76-0544-1

Filed May 18, 1981

No. 80-1844

MICHAEL MOSES SCHNEIDER also known as NGUYEN PHI KHANH, a minor who sues by and through his next friends and adoptive parents, GARY and SANDRA SCHNEIDER, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,

Appellant

v.

UNITED STATES OF AMERICA

And Consolidated Case Nos. 80-1960 and 80-2118

Civil Action No. 76-00544 and 76-0544-3

No. 80-1845

MELISSA HOPE MARCHETTI also known as NGO THI HOA THUONG, a minor who sues by and through her next friends and adoptive parents, DENNIS and PAMELA MARCHETTI, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,

Appellant

v.

UNITED STATES OF AMERICA

And Consolidated Case Nos. 80-1959 and 80-2119

Civil Action No. 76-00544

No. 81-1200

JAMES MATTHEW ZIMMERLY also known as DO. PHI HUNG, a minor who sues by and through his next friends and adoptive parents, MELVIN E. and WANDA ZIMMERLY, *etc.*

v.

LOCKHEED AIRCRAFT CORPORATION
DEFT. AND THIRD PARTY PLTFF.

v.

THE UNITED STATES OF AMERICA
THIRD PARTY DEFT.,

Appellants

And Consolidated Case No. 81-1337 (Consolidated with No. 81-1200 only)

Appeals from the United States District Court for the District of Columbia

Before: BAZELON, Senior Circuit Judge, and McGOWAN and ROBB, Circuit Judges

JUDGMENT

These causes came to be heard on appeal from the United States District Court for the District of Columbia, and were argued by counsel on May 12, 1981. In view of the pendency of multiple proceedings governed by rulings in the cases under review, we are issuing our judgment today with an opinion to follow at a later date. It is,

ORDERED AND ADJUDGED that *Lockheed Aircraft Corp. v. Schneider*, No. 80-1844, *Lockheed Aircraft Corp. v. Marchetti*, No. 80-1845, and *Zimmerly v. Lockheed Aircraft Corp.*, No. 81-1200, are reversed and remanded

for new trials. The opinion to follow will elaborate on, *inter alia*, the following conclusions of law:

A. Exhibit 109 is inadmissible;

B. Application of collateral estoppel with regard to the issue of causation of injury is inappropriate in these and all related cases;

C. An award of prejudgment interest is impermissible in these cases;

D. The taxation of amicus fees as costs against Lockheed is error;

E. Fee awards to the guardian *ad litem* taxed against Lockheed for services performed after this date must be based upon a particularized showing of each specific plaintiff's need for such services; and

F. The District Court correctly interpreted the second stipulation entered into by the parties on September 14, 1979.

The Court will issue an opinion at a later date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 76-00544

Filed Oct. 9, 1981

No. 81-1200

JAMES MATTHEW ZIMMERLY also known as DO PHI HUNG, a minor who sues by and through his next friends and adoptive parents, MELVIN E. and WANDA ZIMMERLY, *etc.*

v.

LOCKHEED AIRCRAFT CORPORATION
DEFT. AND THIRD PARTY PLTFF.

and

THE UNITED STATES OF AMERICA
THIRD PARTY DEFT.,

Appellants

And Consolidated Case No. 81-1337

Civil Action No. 76-00544

No. 80-1844

MICHAEL MOSES SCHNEIDER also known as NGUYEN PHI KHANH, a minor who sues by and through his next friends and adoptive parents, GARY and SANDRA SCHNEIDER, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,

Appellant

v.

UNITED STATES OF AMERICA

And Consolidated Case Nos. 80-1960 and 80-2118

Civil Action Nos. 76-0544-1 and 76-00544-1

No. 80-1845

MELISSA HOPE MARCHETTI also known as NGO THI HOA THUONG, a minor who sues by and through her next friends and adoptive parents, DENNIS and PAMELA MARCHETTI, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,

Appellant

v.

UNITED STATES OF AMERICA

And Consolidated Case Nos. 80-1959 and 80-2119

Civil Action Nos. 76-0544-3 and 76-00544-3

Before: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of appellees (infant plaintiffs below) has been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Tamm would grant the suggestion for rehearing *en banc.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action Nos. 76-00544, 76-0544-1, 76-00544-1

Filed Oct. 9, 1981

No. 80-1844

MICHAEL MOSES SCHNEIDER also known as NGUYEN PHI KHANH, a minor who sues by and through his next friends and adoptive parents, GARY and SANDRA SCHNEIDER, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,

Appellant

v.

UNITED STATES OF AMERICA

And Consolidated Case Nos. 80-1960 and 80-2118

Civil Action Nos. 76-00544, 76-0544 76-00544-3

No. 80-1845

MELISSA HOPE MARCHETTI also known as NGO THI HOA THUONG, a minor who sues by and through her next friends and adoptive parents, DENNIS and PAMELA MARCHETTI, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,

Appellant

v.

UNITED STATES OF AMERICA

And Consolidated Case Nos. 80-1959 and 80-2119

Civil Action No. 76-00544

No. 81-1200

JAMES MATTHEW ZIMMERLY also known as DO PHI HUNG, a minor who sues by and through his next friends and adoptive parents, MELVIN E. and WANDA ZIMMERLY, *etc.*

v.

LOCKHEED AIRCRAFT CORPORATION
DEFT. AND THIRD PARTY PLTFF.

and

THE UNITED STATES OF AMERICA
THIRD PARTY DEFT.,

Appellants

And Consolidated Case No. 81-1337

Before: Bazelon and McGowan, Senior Circuit Judges, Robb, Circuit Judge

ORDER

On consideration of appellees' (infant plaintiffs) petition for rehearing, filed July 7, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Filed Oct. 9, 1981

Civil Action Nos. 76-00544, 76-0544-1, 76-00544-1

No. 80-1844

MICHAEL MOSES SCHNEIDER also known as NGUYEN PHI KHANH, a minor who sues by and through his next friends and adoptive parents, GARY and SANDRA SCHNEIDER, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,

Appellant

v.

UNITED STATES OF AMERICA

And Consolidated Case Nos. 80-1960 and 80-2118

Civil Action Nos. 76-00544, 76-0544-3, 76-00544-3

No. 80-1845

MELISSA HOPE MARCHETTI also known as NGO THI HOA THUONG, a minor who sues by and through her next friends and adoptive parents, DENNIS and PAMELA MARCHETTI, *et al.*

v.

LOCKHEED AIRCRAFT CORPORATION,

Appellant

v.

UNITED STATES OF AMERICA

And Consolidated Case Nos. 80-1959 and 80-2119

Civil Action No. 76-00544

No. 81-1200

JAMES MATTHEW ZIMMERLY also known as DO PHI HUNG, a minor who sues by and through his next friends and adoptive parents, MELVIN E. and WANDA ZIMMERLY, *etc.*

v.

LOCKHEED AIRCRAFT CORPORATION
DEFT. AND THIRD PARTY PLTFF.

and

THE UNITED STATES OF AMERICA
THIRD PARTY DEFT.,

Appellants

And Consolidated Case No. 81-1337

Before: Bazelon and McGowan, Senior Circuit Judges, Robb, Circuit Judge

ORDER

On consideration of the petition for rehearing and clarification of Lockheed Aircraft Corporation, lodged with the Court on July 1, 1981, it is

ORDERED by the Court that the Clerk is directed to file the aforesaid petition and, it is

FURTHER ORDERED by the Court that the petition for rehearing and clarification is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Misc. No. 75-0205

In re AIR CRASH DISASTER NEAR SAIGON, SOUTH VIETNAM ON APRIL 4, 1975

April 12, 1979

Issac N. Groner, Cole & Groner, P. C., Washington, D.C., Oren R. Lewis, Jr., Richard H. Jones, Lewis, Wilson, Lewis & Jones, Ltd., Arlington, Va., J. Vernon Patrick, Jr., Berkowitz, Lefkovzits & Patrick, Birmingham, Ala., for plaintiffs.

Carroll E. Dubuc, Washington, D.C., for Lockheed Aircraft Corp.

William G. Schaffer, James P. Piper, Civ. Div., U. S. Dept. of Justice, Washington, D.C., for the U. S.

MEMORANDUM

OBERDORFER, District Judge.

There is before this Court all the litigation which has grown out of the 1975 crash near Saigon of a Lockheed-built United States Air Force C-5A transport plane carrying United States military and civilian personnel and 226 Vietnamese orphans. The orphans were aboard the plane pursuant to arrangements made for them by the United States and Friends for All Children ("FFAC"), a Colorado non-profit corporation. During the United States' involvement in Vietnam, FFAC had provided care and shelter for orphans there and had arranged for the adoption of a number of them by foster parents in the United States and elsewhere.

Actions against Lockheed on behalf of Vietnamese orphans who survived the crash and on behalf of estates of those who died were filed against Lockheed in the Dis-

trict Court of the District of Columbia by FFAC as original diversity cases. Actions against Lockheed by surviving United States citizens and on behalf of the estates of deceased ones were filed in or removed to various federal courts around the country. Some were originally filed here; others were transferred by the Multi-District Panel.

The Court assumes, without deciding, that it has diversity jurisdiction of the decedents' and surviving orphans' cases, either pursuant to this Court's alienage jurisdiction, 28 U.S.C. § 1332(a)(2), or the Court's domestic diversity jurisdiction, 28 U.S.C. § 1332(a)(1). A careful determination of the jurisdiction of the Court with respect to each meritorious case must await the outcome of communications by the *guardian ad litem* with the legal guardians of the surviving orphans and the heirs or next of kin of the decedents. At that time the Court will be in a position to act on a complete record, *compare* Addendum to Exhibit J-1, Exhibits to Lockheed's Motion for Summary Judgment in C.A. No. 76-0544, and with the benefit of full briefiing by all parties.[1]

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[1] The general rule in the case of prosecution of a claim on behalf of an estate by an executor or administrator is that the citizenship of the representative of the estate determines citizenship for diversity purposes. *See Mecom v. Fitzsimmons Drilling Company*, 284 U.S. 183, 52 S.Ct. 84, 76 L.Ed. 233 (1931). This principle suggests that the citizenship of the legal representatives of the estates of the deceased orphans in the present cases should determine diversity. *Compare* Bush v. Carpenter Bros., Inc., *447 F.2d 707 (5th Cir. 1971)*; McAlpin v. James McKoane Enterprises, Inc., *395 F.Supp. 937 (N.D.Miss. 1977)*; Sadler v. New Hanover Memorial Hospital, Inc., *432 F.Supp. 604 (D.C.N.C. 1977)*. *The minor legal representatives in the present actions, however, appear before the Court by a* guardian ad litem. *The general rule appears to be that in a diversity suit brought by a minor it is the citizenship of the minor and not that of the minor's representative that determines diversity.* See Ziady v. Curley, *396 F.2d 873 (4th Cir. 1969)*. *Some courts, on the other*

Lockheed has claimed over against the United States, which is now a third party defendant in all the cases.

The Court and the parties are proceeding with the administration of these cases on two main tracks. The cases brought by and on behalf of United States citizens have been the principal forum for vigorous discovery, and one of them is scheduled for trial in November, 1979, pursuant to pretrial order entered on January 4, 1979. *Thomas v. Lockheed*, C.A. No. 75-1831. Another case filed on behalf of the estate of Joanna Pray, a deceased Vietnamese, by the same lawyers who represent FFAC, is on the same pretrial schedule as *Thomas* and will be tried in November if *Thomas* is not.

Meanwhile, on the other track, administration of the orphan cases has been impeded by collateral issues relating to the qualification of FFAC as a proper representative of the surviving orphans and the estates of the deceased orphans, and the possible disqualification of the lawyers representing FFAC.[2] For example, FFAC may have a conflict of interest because of its possible liability to the orphans and the estates on account of its role in arranging what may prove to be unconventional and unsafe transportation for those killed and injured. In addition, the United States and Lockheed took vigorous exception to efforts by FFAC not only to substitute foster parents for FFAC as next friend of surviving children but also to substitute them as clients of FFAC's lawyers. Finally, the Court and the parties have been unable to design a satisfactory solution to the problem growing

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hand, have reached a contrary result, holding the citizenship of the representative determinative. See e.g., DiStefano v. Lehigh Valley R. R. Co., *258 F.Supp. 721 (E.D.Pa. 1966)*; compare Fallat v. Gouran, *220 F.2d 325 (3rd Cir. 1955)*.

[2] Motion by Third-party Defendant, the United States, for Order To Show Cause, August 21, 1978; C.A. 75-874 and 76-544.

out of the practical fact that some of the estates represented by FFAC may have no beneficiaries, so that prosecution of some estates' claims might prove to be useless exercises ending with payments by the United States Government and Lockheed that would escheat to some local jurisdiction, after deduction of attorneys fees.[3]

On February 23, 1979,[4] after careful consideration of briefs filed by Charles R. Work, Esq.,[5] as court-appointed *amicus curiae*, responding briefs by the parties and extensive oral argument by *amicus* and counsel, the Court appointed Mr. Work and his law firm as *guardian ad litem* to represent the interests of the surviving orphans and the infant beneficiaries of the estates, at least until the above-mentioned difficulties could be resolved, and, in the interim, to take initiatives under Court supervision to resolve them.[6]

The effect of the February 23, 1979 appointment was to allow FFAC to continue to maintain the actions on

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[3] There remains unresolved the question of whether the office of Foreign Assets Control, Department of the Treasury, would act to freeze any recovery by Vietnamese citizens pursuant to the Trading with the Enemy Act, as amended, 50 U.S.C. App. § 5. *See* Submission of United States of America on applicability of Trading with the Enemy Act, filed May 4, 1978, Misc. 75-0205: Letter from Stanley L. Sommerfield, Acting Director, Office of Foreign Assets Control, to Ms. Barbara Allen Babcock, Assistant Attorney General.

[4] The Court's order of February 23, 1979, was filed in Misc. 75-0205. See Transcript of Proceedings, Friday, March 2, 1979. The Misc. 75-0205 docket has always functioned as the Master Docket in the Saigon Air Crash case, in accordance with Suggested Procedures for Multi-district Litigation, 75 F.R.D. 589 (1977). Any order affecting two or more actions is filed in the Master Docket.

[5] Mr. Work is a leader and former President of the District of Columbia Bar.

[6] Mr. Work's duties as *guardian* are defined in paragraphs 3 and 7 of the February 23, 1979 Order.

behalf of the estates and surviving infants in collaboration with the Court-appointed *guardian ad litem* unless and until FFAC is replaced by the newly-appointed *guardian* or by some other legal representative (in the cases of the estates) or next friend or guardian (in the cases of the surviving infants).[7]

The February 23, 1979, Order also denied Lockheed's motion for summary judgment with respect to the survivors and its renewed motion for summary judgment with respect to the decedents. The thrust of both motions was that, under applicable law, FFAC lacked capacity to bring these lawsuits on behalf of either the surviving orphans or the estates of the deceased ones.

With respect to the surviving orphans, Lockheed maintained in support of its motion that FFAC was neither legal guardian of the infants nor appropriate next friend to bring this lawsuit on their behalf because FFAC was not formally appointed and was not entitled to assume its responsibilities by operation of law. *See* Lockheed's Memorandum in Support of its Motion for Summary Judgment, C.A. 76-0544, Sept. 29, 1979. The Court concluded that it was unnecessary to unravel the tangled web of foreign and domestic legal problems spun by Lockheed's motion. *See* Fed.R.Civ.P. 17(c).[8] FFAC had the capacity as a legal person "who has an interest in the welfare of an infant who may have a grievance or a cause of action," to initiate these actions on behalf of

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[7] The *guardian ad litem*, the adoptive parents or legal representatives proceeding individually are, of course, free to select their own counsel.

[8] Rule 17(c) provides, in relevant part, that: "If an infant or an incompetent person does not have a duly appointed representative he may sue by his next friend or by a *guardian ad litem*. The court shall appoint a *guardian ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

the surviving orphans as a "next friend." *Child v. Beame*, 412 F.Supp. 593, 599 (S.D.N.Y. 1976); Fed.R. Civ.P. 17(c).

Subsequent argument by Lockheed raised the possibility that FFAC may have a conflict of interest because of liability to the surviving orphans. *See* Lockheed's Reply to FFAC's Opposition to Lockheed's Motion for Summary Judgment, Point IV, C.A. 76-0544, November 20, 1978. In light of this potential conflict and pursuant to its duty to ensure proper representation of infant plaintiffs the Court has appointed Mr. Work and his law firm as *guardian ad litem*. Fed.R.Civ.Proc. 17(c). Mr. Work will be alert to recognize actual and potential conflicts and will manage the notification procedure set out in the Court's Order of February 23, 1979 without displacing FFAC. *See Horacek v. Exon*, 357 F.Supp. 71 (D.Neb.1973); *Noe v. True*, 507 F.2d 9 (6th Cir. 1974); *see also United States v. E. I. DuPont de Nemours & Co.*, 13 F.R.D. 98 (N.D.Ill.1952). The appointment of Mr. Work thus cured for the present any lingering defects in FFAC's capacity to maintain this lawsuit on behalf of surviving orphans alleged in connection with Lockheed's summary judgment motion. Accordingly, Lockheed's motion for summary judgment in the survivors' cases, C.A. 76-0544, was denied in the Order filed February 23, 1979.

With respect to the estates, Lockheed's motion contended that the District of Columbia law authorizing a "legal representative" to sue on behalf of an estate, D.C. Code § 12-101, is inapplicable to the decedents' cases under choice of law-conflicts of law principles; Lockheed maintained that the capacity of FFAC or any other representative to represent the estates of the deceased orphans is governed by the law of Colorado or Vietnam, neither of which would have permitted FFAC to maintain this action on behalf of the estates. *See* Lockheed's Motion for Reconsideration of its Motion for Summary

Judgment, C.A. 75-0874, May 31, 1978. In denying Lockheed's renewed motion for summary judgment with respect to the claims on behalf of the estates the Court has resolved the choice of law question in favor of the law of the District of Columbia, specifically D.C. Code § 12-101 governing the survival of actions.[9]

In a Memorandum filed on May 1, 1978, the Court held that while FFAC may not be a perfect legal representative for the estates of deceased orphans, it was the best one before the Court at the time and fell within the broad definition of legal representative as used in D.C.Code § 12-101. Any possible defects in the recognition of FFAC as a legal representative put at issue by the Lockheed motion are also cured for the present by the appointment of Mr. Work as *guardian ad litem* to represent the interests of infant beneficiaries, *i. e.*, heirs or next of kin, of the estates of the deceased orphans. Mr. Work and his law firm are the Court-appointed guardians of the minor legal representatives of the de-

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[9] *See* pp. 527-529, *infra*.

D.C. Code § 12-101 provides, in relevant part, that:

"On the death of a person whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action survives in favor of or against the legal representative of the deceased." The term "legal representative" has been held to apply to "any person who, whether by virtue of testamentary act or [by] operation of law, stands in the place of the decedent with respect to his property . . .." *Strother v. District of Columbia*, 372 A.2d 1291, 1296 (D.C. App. 1977). And *see Thomas v. Doyle*, 88 U.S.App.D.C. 95, 187 F.2d 207 (1951). The term is not restricted to duly appointed personal representatives, *i.e.*, executors or administrators. *Strother v. District of Columbia, id.* FFAC's responsibilities for the transportation arrangements could also affect its capacity as "legal representative".

The District of Columbia Survival Statute is not, by its terms, limited to injuries incurred in the District of Columbia. *Compare* the District of Columbia Wrongful Death Statute, D.C. Code § 16-2701.

ceased orphans, *see Strother v. District of Columbia*, 372 A.2d 1291 (D.C.App.1977), and are entitled to pursue these actions, under the supervision of the Court, pursuant to the authority of Fed.R.Civ.P. 17(c) and D.C.Code § 12-101.[10] Accrdingly, Lockheed's renewed motion for summary judgment in the decedents' cases, C.A. 75-0874, was denied in the Order filed February 23, 1979.

The February 23, 1979 Order also indicated the Court's intention to explain its reasons for refusing to displace the law of the forum, the District of Columbia, as the rule of decision in the decedents' cases. The remainder of this Memorandum sets out the Court's reasons for this decision.

In deciding not to displace the law of the forum as furnishing the applicable rule of decision in the decedents' cases the Court has applied the "interest analysis" process used in the District of Columbia to settle choice of law questions.[11] In "interest analysis" the Court must

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[10] Under District of Columbia law, heirs or next of kin are entitled to recognition as legal representatives in a survival action on behalf of a decedent's estate. *See Thomas v. Doyle*, 88 U.S.App.D.C. 95, 187 F.2d 207 (1950); *Strother v. District of Columbia*, 372 A.2d 1291 (D.C. App. 1977). Where, as here, there are heirs or next of kin who are themselves minors a *guardian ad litem* is the appropriate instrumentality to protect their interests pending administration of the decedents' estates. Fed.R.Civ.P. 17(c).

[11] Whether by virtue of law, *see Semler v. Psychiatric Inst.*, 188 U.S.App.D.C. 41, 45-50, 575 F.2d 922, 926-31 (1978); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 62 S.Ct. 1284, 86 L.Ed. 1757 (1941), or of custom, *see Lee v. Flintkote Company*, 593 F.2d 1275, 1278 n. 14 (D.C.Cir.1979), a federal court exercising diversity jurisdiction in the District of Columbia looks to District of Columbia decisions to provide applicable choice of law.

District of Columbia decisions generally apply an "interest analysis" approach to determine the law applicable in tort cases. *Semler v. Psychiatric Inst.*, 188 U.S.App.D.C. at 43, 575 F.2d at 924. Under this approach, the court attempts to

consider whether the public policy of a particular legislature would be furthered, frustrated or irrelevant if applied in the case at bar and will displace the law of the forum only if the policy of the legislature of another forum has a stronger interest.

Precedent offers only limited guidance for interest analysis in the present case because the status of the passengers and the carrier is *sui generis*. The pleadings and undisputed facts show that this crash has put at stake unique policy interests. The victims were civilian orphans, natives of a jurisdiction, the Republic of South Vietnam, which itself perished as a government a few days after the crash. The orphans were being taken to new homes and new parents in other countries on a United States Air Force plane specially detailed by the United States for this mission. It is unnecessary for conflicts of law purposes to resolve the tantalizing legal questions regarding the legal status of the orphans at

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discover and evaluate, for each potential source of law, what interest the legislature of that jurisdiction may have in applying its law to the parties and circumstances in the case. *See Semler v. Psychiatric Inst., id. See generally* Crampton, Currie, Kay, Conflict of Laws: Cases, Comments, Questions (1975) at 206-296. Although "contacts" with a jurisdiction may be relevant to studying the relationship between the circumstances of a lawsuit and the legislative policies of a jurisdiction, these contacts serve only as one means to ascertain the relevance of such policies, and thereby to identify a legislature's interest, if any, in adjudicating the case pursuant to its laws; "contacts" are not ends in themselves. *See also Tramontana v. S. A. Empresa De Viacao Aerea Rio Grandense*, 121 U.S.App.D.C. 338, 341, 350 F.2d 468, 471, *cert. den.* 383 U.S. 943, 86 S.Ct. 1195, 16 L.Ed.2d 206 (1966); *Compare Textile Museum v. Eberstadt & Co., Inc.*, 440 F.Supp. 30, 32 (D.C.D.C. 1977).

There is no reason, in the present case, why District of Columbia law regarding survival of actions, including the element of capacity to sue, should not be applied *in toto*: there is no call for *depacage*. *Compare Currie, id.*, at 378-89; note 13, *infra*.

the time of the crash vis-a-vis natural parent and adoptive parent. They were orphans of the Vietnam War. The United States Government (as distinguished from any State of the United States) carried on that war and ended it for national foreign policy and military purposes. The transportation of the orphans on a United States Air Force C-5A, built by Lockheed, was incident to carrying out those foreign and military policies. If the death and injury suffered by these orphans in the dying days of the Vietnam war was caused by the negligence of the United States or of Lockheed, which built the plane expressly for the United States and to its specifications, that is a matter of far greater interest and concern to the United States than to any State of the United States. It is a "paramount" interest and concern of the United States federal government that its courts provide a just and reasonable resolution of claims such as those on behalf of the estates of the deceased orphans. *Compare United States v. California*, 332 U.S. 19, 40, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).

The District of Columbia law of survival of actions was enacted by Congress pursuant to its constitutional power and responsibility to "exercise exclusive Legislation in all Cases whatsoever, over . . . the Seat of the Government of the United States." U.S.Const. Art. I, § 8, cl. 17.[12] The pleadings and discovery afford ample

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[12] This constitutional provision represents

> "an unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and incidental. The District is . . . the capital—the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised . . .." *O'Donoghue v. United States*, 289 U.S. 516, 538-39, 53 S.Ct. 740, 746, 77 L.Ed. 1356 (1932).

Pursuant to its constitutional authority Congress has enacted legislation in the District of Columbia governing the

basis for the Court to conclude for purposes of this interim and limited ruling that officials acting at the Seat of the Government were the ultimately responsible actors in the chain of circumstances and specific events which ended in the deaths and injuries at issue here. Because of the national interests at stake here, the law of the forum, which is the law enacted by Congress for the Seat of the Government, should be displaced only if some other jurisdiction has an overwhelming policy interest in applying its own law. *See In re Paris Air Crash*, 399 F.Supp. 732, 745 (C.D.Calif.1975). *Compare Currie, supra*, n. 11, at 221-224.

Those jurisdictions claimed by Lockheed or FFAC to have a stronger or equal interest so as to be an appropriate source of law for the present cases are: Georgia, the site of the Lockheed plant which built the ill-fated plane for the United States; Colorado, the place of FFAC's incorporation and the source of its letters of administration for the deceased orphans' estates; Virginia, the headquarters of the Departments of Defense and Air Force; and Vietnam, the scene of the crash and the original home of the orphans.[13]

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survival of causes of action. The District of Columbia Survival Statute, D.C. Code § 12-101, was enacted by Congress and represents a Congressionally determined policy governing survival of actions.

[13] California might be thought to have a special interest in this litigation since Lockheed is a California corporation and California has an interest in protecting California residents from excessive financial burdens. *See In re Paris Air Crash*, 399 F.Supp. at 743. Whatever interest California may have, it is not of sufficient magnitude to displace the Congressionally enacted law of the forum: the District of Columbia law on survival of actions. This must also be Lockheed's position since Lockheed has not argued either in its Motion for Summary Judgment or in its Motion for Reconsideration that the law of California should apply to these actions.

In any event, the only element of California law which could further California's interest in protecting its resi-

There is no legal or functional basis for any contention that the law and policy of any jurisdiction relating to survival of actions is more appropriate to the decedents' cases than the Congressionally enacted law of the District of Columbia. To recite these alternative sources of law is to expose the relative insignificance of the States' interests compared to that of the United States as embodied in the Acts of Congress relating to the

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dents from burdensome judgments is the California law regarding limitation of damages in death cases. *See Hurtado v. Superior Court*, 11 Cal.2d 574, 584, 114 Cal. Rptr. 106, 112, 522 P.2d 666, 672 (1974); *In re Paris Air Crash*, 399 F.Supp. at 744-45. The Court's own research, although not exhaustive, does not indicate that the survival statute passed by Congress would allow a greater recovery against Lockheed than the California survival statute, California Probate Code § 573. Both D.C.Code § 12-101 and California Probate Code § 573 prevent the abatement of a cause of action in favor of (or against) an injured party and provide for its enforcement by (or against) a representative of the deceased. *Compare Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1954) *with Jones v. Rogers Memorial Hospital*, 143 U.S.App. D.C. 51, 442 F.2d 773 (1971). Both statutes base recovery on the probable future earnings of the deceased. *Compare Strother v. District of Columbia*, 372 A.2d 1291 (1977) *with Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913 (1946). California Probate Code § 573 explicitly excludes recovery for pain and suffering. Prior to August 2, 1978, D.C.Code §12-101 also barred recovery for pain and suffering. District of Columbia law 2-95, effective August 2, 1978, removes this bar and allows recovery for pain and suffering under the D.C. Survival Statute. This amendment to D.C.Code § 12-101 is not applicable to the present causes of action since they accrued before the amendment became effective. Both the District of Columbia and California statutes allow recovery of punitive damages under appropriate circumstances. *See Pease v. Beech Aircraft Corp.*, 38 Cal.3d 450, 113 Cal. Rptr. 416 (1974) and *Gibbs, Etc. v. Investigators of D.C.*, 105 Washington Law Reporter 1 (D.C.App.), January 3, 1977.

District of Columbia. Neither Colorado, Georgia, nor Virginia has any interest in providing compensation for the decedents' estates since none of the decedents resided in the United States at the time of their deaths, nor do there exist any medical creditors. *Compare* B. Currie, Selected Essays on the Conflict of Laws (1963) at 701-702. With respect to Colorado, suffice it to say that it ill behooves either defendant to seek application of the law of Colorado in light of their contentions about the significance of FFAC's contacts with its wards and beneficiaries; a natural corollary is the relative smallness of Colorado's interest in this lawsuit. The interest claimed for Georgia by FFAC—maintaining Georgia's reputation as a place where safe planes are built—is likewise dwarfed by comparison with the interest of the United States that the rule of decision, including the element of capacity, be the law of the Seat of the Government.[14]

The interest of Vietnam, in contrast, might weigh heavily here if these decedents had not crashed while in the process of permanently emigrating and if the government which might have had an interest had not been

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[14] This is particularly true in light of federal preemption of the field of aviation regulation, *see In re Paris Air Crash*, 399 F.Supp. at 746; *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 403 (Fth Cir. 1974); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), and the fact that the airplane here was a military airplane used by the United States Air Force. Whatever legitimate interest Georgia may have in discouraging the manufacture of defective airplanes, Georgia's interest is no greater than that of any other State, not to mention Congress, in discouraging the manufacture of such airplanes. No evidence has been advanced in support of any argument that defective airplanes manufactured in Georgia have a greater likelihood of injuring Georgia residents or property than residents or property in any other State, or of doing any injury to Georgia in a *parens patriae* sense.

conquered and extinguished by another government which apparently has no such interest.[15]

This is not to suggest that in any other diversity case the rule of decision should be the law of the District of Columbia because the lawsuit has national importance. These orphans were en route to the United States when they were killed and injured. The United States is a party now. These cases were filed in this forum; the Multi-District panel has assigned all the companion cases here. More importantly, the United States had a special role in the design of the plane that crashed, and in the

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[15] Insofar as present Vietnamese law might allow recovery by those who might have expected maintenance from the decedents if they had lived, that policy is irrelevant where, as here, the decedents are all orphans and were permanently departing for homes and families elsewhere before the accident occurred. Similarly, the interest Vietnam might have in providing recovery for deceased residents so as, for example, to provide not only for the beneficiaries of a decedent's estate, but also to satisfy the claims of possible medical creditors, is largely irrelevant where, as here, the decedents were no longer residents of Vietnam at the time of the accident and the record does not disclose the existence of any medical creditors. Vietnam therefore has no significant interest in applying its law to the claims of the deceased orphans in this case.

There is an additional reason for not applying a Vietnamese rule of decision that would differ significantly from United States law that lies in the nature and function of this Court. As the Court of Appeals for the Fifth Circuit noted in refusing to apply Cambodian law to the claims of two Americans injured in Cambodia:

> "We are a Court of the United States, an instrumentality created to effectuate the laws and policies of the United States. We conclude that in this case we have no warrant, legal or moral, to frustrate well established American policies by an application of the local policies of a foreign government." *Challoner v. Day and Zimmerman*, 512 F.2d 77, 82 (5th Cir. 1975).

Accord In re Paris Crash, 399 F.Supp. at 745.

general circumstances and the particular events which culminated in the crash. Neither the United States nor Lockheed may prove to be legally liable for the crash or the resulting damages. But the United States, as a sovereign in the international sense, is best served, and neither any other jurisdiction, nor Lockheed, is measurably disadvantaged, by a decision that the law of the forum, enacted by Congress as the rule of decision for cases in the Seat of Government, should not be displaced.[16] For these reasons the Court so ruled on February 23, 1979.

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[16] Application of the survival statute enacted by Congress to this action advances the national interest and impairs no interest of Colorado, Virginia, Georgia or Vietnam. This situation is very different from one in which some foreign jurisdiction has a significant interest in the application of its law and the forum state has no such interest. In such circumstances there may be a good reason to apply foreign law, *see, e.g., Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense,* 350 F.2d at 471, and the Due Process and Full Faith and Credit Clauses are available to enforce such an obligation. *See, e.g., Home Insurance Co. v. Dick,* 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930); *see also Huntington v. Attrill,* 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892).

There might also be a Constitutional obligation to apply the law of another State in a second situation that is also distinguishable from the case at bar: *viz.*, where the result otherwise would be unduly disruptive of the national policy of fashioning a uniform system of enforcement of the rights and duties created by the States. *See e.g., Order of United Commercial Travelers v. Wolfe,* 331 U.S. 586, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947); *but compare National Mutual B. & L. Ass'n. v. Brahan,* 193 U.S. 635, 24 S.Ct. 532, 48 L.Ed. 823 (1904).

Here, on the other hand, no such imbalance of interests presents itself in the application of District of Columbia law; no Constitutional principle forbids the application of this law to this case. *See Semler v. Psychiatric Inst.,* 188 U.S.App. D.C. at n. 25, 575 F.2d at n. 25; *Alaska Packers Association v. Industrial Accident Commission,* 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1935). *Compare Home Insurance Co. v. Dick,* 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930); *see generally* Currie, *Selected Essays, supra,* at 188-282.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0544

FRIENDS FOR ALL CHILDREN, INC., as legal guardian and next friend of the named 150 infant individuals, *et al.*,
Plaintiff,

—against—

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

—against—

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

Filed Oct. 30, 1980

COMPREHENSIVE PRETRIAL ORDER (CPTO)

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E. *Taxation of Fees Awarded the Guardian Ad Liten/ Amicus*:

This Court has taxed fees awarded the guardian *ad-litem/amicus curiae* against Lockheed as court costs in favor of the infant plaintiff (in light of Lockheed's agreement not to contest liability). The guardian *ad litem* is an officer of this Court whose appointment was made necessary by the litigation. *Franz v. Buder*, 38 F.2d 605 (8th Cir. 1930). The appointment of the guardian *ad litem* and *amicus curiae* was essential to the proper consideration of this case. Accordingly, taxation against Lockheed of such fees as are awarded the guardian *ad litem/amicus curiae* was deemed appropriate. *In re Peterson*, 253 U.S. 300 (1919); *Eaton v. Karr*, 251 A.2d 640 (D.C. App. 1968). In light of Lockheed's September 14, 1979 Stipulation not to contest liability, each infant should be deemed to be the prevailing party. See *Chesapeake & Potomac Tel. Co. v. Clay*, 90 U.S. App. D.C. 206, 194 F.2d 888, 890 (1952); C. Wright & Miller, 10 Fed. Practice & Procedure § 2667 (1973).

* * * *

APPENDIX F

Section 1920 of Title 28 of the United States Code provides:

"Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

1. Fees of the clerk and marshal;

2. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

3. Fees and disbursements for printing and witnesses;

4. Fees for exemplification and copies of papers necessarily obtained for use in the case;

5. Docket fees under section 1923 of this title;

6. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Rule 17(c) of the Federal Rules of Civil Procedure provides:

"Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

Opposition

1

Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1270

LOCKHEED CORPORATION,
Petitioner,

V.

MICHAEL MOSES SCHNEIDER, suing through his adoptive parents GARY AND SANDRA SCHNEIDER; CHARLES R. WORK, Esquire, and PEABODY, RIVLIN, LAMBERT & MEYERS, guardians ad litem for MICHAEL MOSES SCHNEIDER,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

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February 6, 1982

Craftsman Printing, Inc., 120 Citation Ct., Birmingham, AL 35209, 942-3939

RESTATEMENT OF QUESTION PRESENTED

Whether district courts have discretion to tax the fees and expenses of a guardian ad litem appointed pursuant to Rule 17(c) of the Federal Rules of Civil Procedure.

PARTIES BELOW

In addition to the parties identified in the Petition, the following were parties in the litigation below:

Charles R. Work, Esquire, *amicus curiae* and guardian *ad litem* for Michael Moses Schneider;

Peabody, Rivlin, Lambert & Meyers, *amicus curiae* and guardian *ad litem* for Michael Moses Schneider;

Friends for All Children, Inc., a non-profit corporation which originally filed this action as next friend of the infant plaintiff.

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IN THE

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OCTOBER TERM, 1981

No. 81-1270

LOCKHEED CORPORATION,
Petitioner,

V.

MICHAEL MOSES SCHNEIDER, suing through his adoptive parents GARY AND SANDRA SCHNEIDER; CHARLES R. WORK, Esquire, and PEABODY, RIVLIN, LAMBERT & MEYERS, guardians ad litem for MICHAEL MOSES SCHNEIDER,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

OPINIONS BELOW

An important decision has been rendered in the courts below, since the filing of the Petition, involving many of the issues raised in the Petition. On January 27, 1982, the district court entered an order and opinion (Resp. App. A, pp. 1a-2a and B, pp. 3a-19a) which contemplates further proceedings in the district court relating to issues raised in the Petition.

JURISDICTION

Respondents adopt Petitioner's statement.

STATUTE AND RULE INVOLVED

Respondents adopt Petitioner's statement.

STATEMENT

On April 2, 1976, Civil Action 76-0544 was filed on behalf of Michael Moses Schneider and 149 other Vietnamese orphans by Friends For All Children, Inc. ("FFAC"), a non-profit adoption agency, as the infants' next friend and legal guardian under Vietnamese law. The defendant-petitioner is Lockheed Aircraft Corporation ("Lockheed"), the manufacturer of the Galaxy C5A aircraft which crashed near Saigon, Vietnam on April 4, 1975. (Pet. App. 4a.) The plane was carrying a number of Vietnamese orphans bound for adoptive homes in the United States and abroad. (Id.) The C5A flight was part of an evacuation program sometimes referred to as "Operation Babylift." The flight was arranged by FFAC and the United States Government, following the withdrawal in early 1975 of United States troops from South Vietnam. (Id. 4a-5a.) One hundred forty-four of the approximately 327 persons aboard the plane died; 150 orphans survived. (Id.) The complaint sought to recover damages from Lockheed on behalf of the children for their personal injuries, including brain damage suffered as a proximate result of the explosive decompression and crash. (Id. 6a.)

A. Lockheed's "defense by attrition"

On April 16, 1976, Lockheed filed its Answer in which it admitted that the C5A had crashed but disclaimed liability

and alleged, as an absolute defense, that FFAC could not maintain this action on behalf of the infant children. (Id. 6a-7a.)[1]

Lockheed's defense of this action was characterized by the district court as a "defense by attrition."[2] Lockheed did not concede liability until September 14, 1979, after the close of discovery on liability, and then only in exchange for the infants' waiver of punitive damages.[3]

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1. In its Answer, Lockheed denied that FFAC had been duly appointed as legal guardian for the infant plaintiffs and alleged as defenses:

> XVII. That the plaintiff Friends For All Children, Inc., lacks legal capacity, standing or authority to sue, is not the real party in interest in this action, and has failed to join as parties all persons needed for a just adjudication of plaintiffs' alleged claims.
>
> XVIII. That the plaintiff Friends For All Children, Inc., is not the real party in interest as the legal friend and guardian of the one hundred and fifty infants listed in the caption to the complaint and all necessary parties have not been joined herein.

2. In its May 30, 1980 Order, the District Court described Lockheed's defense, stating: "[D]efendant has deployed a formidable force of lawyers and experts and has vigorously contested almost every item of evidence and every point of law *in a questionable attempt at defense by attrition.* My efforts at simplifying the trial and encouraging settlement have been unsuccessful." Memorandum and Order, dated May 30, 1980. (Emphasis supplied.)

3. On September 14, 1979, counsel for the parties and the guardians *ad litem* entered into a partial settlement which is contained in two Stipulations. These Stipulations provide in part as follows:

> (a) Lockheed shall not contest its liability for compensatory damages;
>
> (b) Lockheed shall, upon entry of judgment in any infant plaintiff's case from which an appeal is to be taken, pay thirty percent (30%) of the amount of such judgment, notwithstanding the appeal so taken; and
>
> (c) Lockheed shall immediately pay to the guardian *ad litem* $5,000 for each infant plaintiff for whom an amended complaint is filed to be used for medical diagnosis and treatment, therapy, tutoring, and litigation expenses of the infant plaintiff.

The first trial, Michael Schneider's trial, began on March 17, 1980, a full five years after the crash. It lasted four weeks. The parties called thirty-two witnesses. After deliberating for approximately two days, the jury returned a verdict in favor of Michael Schneider and awarded damages in the amount of $500,000. (Pet. App. 9a.) The Schneider case, and the cases of Melissa Marchetti and James Zimmerly, were all appealed by Lockheed on the ground that the admission of plaintiffs' Exhibit 109 was improper.[4] (Id. 11a.) The court of appeals reversed and remanded all three cases for new trials.[5] The court of appeals did, however, uphold the district court's decision assessing the fees and expenses of the guardians *ad litem* against Lockheed. (Id. 40a-42a.)

B. Appointment of the guardians *ad litem*

Immediately after the crash of the C5A, the surviving infants were flown to the United States and released to their adoptive parents following an examination at the Presidio Hospital in San Francisco. (Id. 6a.) FFAC filed this action on behalf of the 150 surviving infants as their "legal guardian and next friend."[6] (Id. 6a-7a.)

Lockheed challenged the legal standing of FFAC to represent the infant plaintiffs in its April 16, 1976 Answer and in a

4. Plaintiffs' Exhibit 109 was an extract from the transcript of a January 6, 1978, hearing on the government's motion to dismiss Lockheed's third party complaint against the government, at which Lockheed's counsel had stated to the district court that the infant plaintiffs "without oxygen at 23,000 feet probably sustained some injury" at the time of the explosive decompression. This statement by Lockheed's counsel was admitted into evidence as an admission against interest by Lockheed, but the district court gave Lockheed full opportunity to explain and contradict the statement.

5. Melissa Marchetti's case was subsequently settled for $851,000. Settlements have also been reached in the cases of Adam Wright ($1,000,000), James Reynolds ($860,000), and Le Thi Casper ($300,000).

6. Under Vietnamese law, according to affidavits submitted below, FFAC was the legal guardian of the children in its custody. Lockheed filed affidavits challenging this conclusion. The district court ruled that FFAC had the legal capacity to initiate the action on behalf of the children.

motion for summary judgment. On February 23, 1978, FFAC wrote the adoptive parents of the infant plaintiffs, advising them of Lockheed's position and suggesting that the parents substitute themselves for FFAC as named plaintiffs.[7] Based on this correspondence, the United States filed a motion for an order to show cause why FFAC's counsel should not be disqualified. Lockheed joined in the motion. Lockheed also moved for summary judgment on the ground that FFAC lacked the legal capacity to sue on behalf of the infant plaintiffs.[8] (Pet. App. 7a.)

The district court appointed Charles R. Work, Past President of the District of Columbia Bar, as *amicus* to advise the court whether counsel for FFAC should be disqualified and whether a guardian *ad litem* should be appointed to sue on behalf of the children. (Id.) The *amicus* issued a report in which he determined that there was no basis for defendants' motion to disqualify plaintiffs' counsel. Memorandum of *Amicus Curiae,* dated January 24, 1979. The district court denied the motion.[9]

7. This suggestion was entirely proper. See Rule 17(a), Fed.R.Civ.P.: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

8. Thus, on the one hand, Lockheed contended that only the adoptive parents, and not FFAC, could sue as next friend for the infant plaintiffs, but, on the other hand, Lockheed maintained that counsel for FFAC be disqualified for notifying the adoptive parents of Lockheed's efforts to dismiss their infants' cases because of FFAC's alleged lack of standing. But see Rule 17(a), quoted in note 7, *supra.*

9. Neither Lockheed nor the United States appealed the trial court's denial of this motion. The disqualification requested by the government and Lockheed was contrary to established law. See *W. T. Grant Co.* v. *Haines,* 531 F.2d 671, 677 (2d Cir. 1976); *Lefrak* v. *Arabian American Oil Co.,* 527 F.2d 1136 (2d Cir. 1975); *Fisher Studio* v. *Loew's Inc.,* 232 F.2d 199 (2d Cir.), *cert. denied,* 352 U.S. 836 (1956). Lockheed cited no cases in support of its argument for disqualification. The cases cited by the government were found by the *amicus* to be distinguishable from the circumstances of this case.

Following lengthy written briefs and oral argument by the parties and on the recommendation of the *amicus*, the district court denied Lockheed's motion for summary judgment by Order dated February 23, 1979. (Pet. App. 8a.) In its Order the district court also appointed Charles R. Work and his firm of Peabody, Rivlin, Lambert & Meyers as guardians *ad litem* to represent the interests of the surviving infants and to undertake:[10]

> "(1) To give notice to the present legal guardians of surviving infants of the pendency of this lawsuit . . . of their rights and obligations . . . including their right to join this lawsuit. . .
>
> (2) To examine the relationship between the surviving infants and FFAC in light of any facts which may be developed through discovery that may bear on FFAC's potential liability as an additional defendant in this lawsuit.
>
> (3) To take whatever other action he deems necessary or appropriate, including continued representation of the interests of all surviving infants."

Pursuant to the Order of February 23, 1979, and the September 14, 1979 Stipulations, the guardian informed the parents of all 150 surviving orphans of their right to substitute themselves as named plaintiffs. (Id.) The parents of 115 of the children, including Michael Schneider, have so far exercised this right. (Id.)

The adoptive parents of Michael Schneider and the guardian *ad litem* filed an amended complaint on behalf of the infant

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10. Lockheed requested the district court to certify the February 23, 1979 Order for immediate appeal pursuant to 28 U.S.C. § 1292(b). The district court denied Lockheed's motion for certification on March 2, 1979. Lockheed thereupon filed a motion for stay and petition for writ of mandamus in the court of appeals. The motion for stay was granted; however, following written argument, the court of appeals on August 7, 1979, denied Lockheed's petition for writ of mandamus and vacated its stay order.

on December 21, 1979. (Id.) By this procedure, Michael Schneider's parents and the guardians *ad litem* substituted themselves for FFAC as next friend of the infant. (Id.)

C. The guardian *ad litem's* services

In the court of appeals, Lockheed did not question the district court's authority to appoint a guardian *ad litem* for the infant plaintiffs. (Pet. App. 40 a.) In the district court, Lockheed had argued that it was not adequately protected against further litigation by the infant parents, and could not settle the plaintiff Michael Schneider's case, or any other case, unless the questions with respect to the adequacy of representation of the infants were resolved.[11] In its Memorandum of Points and Authorities in Support of Defendant Lockheed Aircraft's Corporation's Motion for Summary Judgment, filed September 29, 1978, Lockheed stated:

> "[D]efendant clearly cannot conduct meaningful settlement negotiations with FFAC and FFAC has no binding authority but must receive approvals from the parents who must then, in many cases, apply to their local courts for final approval."

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11. Lockheed argued in its "Defendant Lockheed Aircraft Corporation's Submission on the Proposed Appointment of a Guardian *Ad Litem* and Preliminary Matters," filed January 12, 1979, (at p. 10) that:

> "Further, defendant might well be prejudiced by subsequent actions by infants who might successfully assert a lack of jurisdiction in this Court."

On February 9, 1979, Lockheed argued to the trial Court:

> ". . . We have settled some of these cases [other than the infants' cases]. We are very concerned that the process by which we ultimately proceed insures that the ultimate representative with whom we either deal with before trial or after trial is someone that legally can withstand a challenge not only from us but from someone later on, i.e., one of the infants who may or may not be happy as for as settlement at trial and comes in at the age of 21 from France or Germany and says, "we are going to do it again." We don't want to have to do it again. I'm sure the Court doesn't want to do it again and we would like to get some certainty with respect to whoever it is that is finally here."

The appointment of the guardian *ad litem* gave Lockheed a court-appointed representative of the infants with whom to negotiate and was designed to protect Lockheed against efforts to relitigate by insuring the binding effect of any settlement or judgment.[12] The district court appointed the guardian *ad litem* for the benefit of Lockheed, although the district court noted that "FFAC had the capacity as a legal person 'who has an interest in the welfare of an infant who may have a grievance or cause of action,' to initiate these actions on behalf of the surviving orphans as a 'next friend'." *In Re Air Crash Disaster Near Saigon, South Vietnam,* 476 F. Supp. 521 (D.D.C. 1979).

The guardian *ad litem* was also appointed to resolve any possible question that the interests of the infants might conflict with those of the adoptive parents and that FFAC's interests might conflict with those of the infants and adoptive parents. Lockheed contended that FFAC's interests were in conflict with the interests of the children. No such conflict between FFAC and the infants and parents was ever shown to exist. Indeed, the *amicus* concluded that "it does not appear to *amicus* that FFAC was negligent in putting the children on the plane." Memorandum of *Amicus Curiae* dated January 24, 1979. The District Court reasoned that appointment of the guardian would insure that proper representation could not be questioned. (Pet. App. 62a.)

Mr. Work and his firm, as guardians *ad litem,* performed significant services to the district court, the infant plaintiffs, *and Lockheed.* The court of appeals observed:[13]

12. The appointment of a guardian *ad litem* made it possible for Lockheed to enter into the two Stipulations of September 14, 1979 (see note 3, *supra*) and into subsequent settlements of individual cases.

13. These findings by the court of appeals are in direct conflict with the following misstatement of facts in Lockheed's Petition:

"(a) the guardians' services were occasioned by the conduct of, and have benefitted, plaintiffs rather than Lockheed;

". . .During the period preceding the parents' entry into the litigation, the guardians performed a significant service to the court by notifying parents and coordinating litigation efforts. Even after numerous parents had been brought into the litigation, the guardians continued to oversee the litigation, participate in settlement discussions, and negotiate stipulations. . . ." (Pet. App. 38a.)

* * *

". . .The case was instituted shortly after the infants were installed in their new homes throughout the world. As a result, a significant expenditure of time and funds was necessary before the parents could be located and a manageable trial procedure developed. Even then, the record suggests that some adoptive parents were wary of invitations to join the lawsuit. . . ." (*Id.* 41a.)

D. The court of appeals' decision

The court of appeals held that the district court had the authority to tax the fees and expenses of the guardian *ad litem* as costs and had not abused its discretion in taxing those costs against Lockheed for services performed by the guardian *ad litem* up to and through the trials in *Schneider, Marchetti,* and *Zimmerly II.* (Pet. App. 42a.) A guardian *ad litem* fee, the lower court held, is not an "attorney's fee," the taxation of which is proscribed by *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240 (1975). (Id. 41a.) The role of a guardian *ad litem,* the court observed, unlike the private attorney in *Alyeska,* is a "hybrid role, advising one or more parties as well as the court." (Id.) The court further held that the district court did not

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(b) those services were devoted in substantial measure to persuading people to sue Lockheed;

(c) the majority of those services have been undertaken *after* the parents of the children entered the litigation and retained their own counsel; and

(d) those services overlapped and supplemented the legal services ordinarily provided by retained counsel." (Petition, p. 20)

abuse its discretion in compensating the guardian *ad litem* for "legal" expenses or expenses incurred after the parents were brought into the litigation, because, "as appellant [Lockheed] recognizes," the "litigation presents difficult problems of representation." (Id.)

E. Recent proceedings in the district court following remand by the court of appeals

On July 22, 1981, the guardians *ad litem* filed the Guardian *Ad Litem's* Motion For Partial Summary and Final Judgment, in which the guardians *ad litem* moved the district court to enter final judgment taxing their fees against Lockheed for services rendered between February 22, 1979 and May 19, 1981.[14] In response to the guardians' filings, Lockheed, on August 7, 1981, filed an opposition brief in which it argued *inter alia* that (1) final judgment taxing the guardian *ad litem* fees and expenses against it should be denied as "premature" since Lockheed's appeal of the district court's order taxing it with the guardian *ad litem* fees and expenses was still pending, (2) the guardians *ad litem* were not the "prevailing party," and (3) the guardian *ad litem* services, other than the written notification to the parents of the infant plaintiffs, were rendered without the prior approval of the district court. Defendant's Opposition to the Guardian *Ad Litem's* Motion for Partial Summary and Final Judgment, dated August 7, 1981.

Similary, on October 22, 1981, the government filed a Response of Third Party Defendant to Guardian *Ad Litem's* Second Supplemental Affidavit, in which the government objected to "any fees to guardians which apply to work done or undertaken which is outside the normal duties and responsibilities of a guardian *ad litem*."[15]

14. In its opinion, which was issued on May 19, 1981, the court of appeals instructed the district court: ". . . for all services rendered from the date of this judgment forth, the guardian should be required to show that the particular plaintiff had need of the particular services for which the guardian seeks a fee." (Pet. App. 42a.)

15. With respect to fees for work relating to "legal issues and settlement negotiations," the government stated:

Several days ago, the district court, on January 27, 1982, entered an Order and Partial Summary Judgment with accompanying Memorandum (Resp. App. 1a-2a and 3a-19a.), in which it ordered Lockheed to pay guardian *ad litem* fees in the amount of $222,510. With regard to the fees of the guardians *ad litem* for "legal research," the district court ruled:

> "Time spent researching legal issues requires some discussion. Defendant has claimed that no time spent on legal issues is recoverable under *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). That position was rejected by the Court of Appeals in *Schneider v. Lockheed, supra.* But time spent on legal research that is more properly the role of litigation counsel should not be recoverable as a cost. *See, e.g., Franz v. Buder, supra.*" (Resp. App. 15a-16a.)

The district court disallowed, as taxable costs against Lockheed, fees of the guardians *ad litem* in the amount of $82,387 as "not now recoverable from defendant." (Resp. App. 17a.)

The district court determined that the guardian *ad litem* fees for research relating to the issues of payment of fees and costs, prejudgment interest, *forum non conveniens*, and statute of limitations—while "entirely proper" in order for the guardians to furnish a second, independent opinion to plaintiffs on the value of plaintiffs' claims for settlement purposes—may not be taxed as costs against Lockheed. The district court reasoned:

> ". . . Evaluation of claims and settlement offers and resolution of legal uncertainties in connection with such evaluations is a task normally performed by counsel." (Id. 16a.)

"It is certainly foreseeable that legal issues and settlement negotiations are an integral part of the litigation. But it appears, however, that these subjects are those traditionally left to and treated by counsel for plaintiff, not by a guardian *ad litem* appointed by this Court." Response of Third Party Defendant, dated October 22, 1981.

The district court also disallowed guardian *ad litem* fees for "miscellaneous" time devoted to legal research, but reserved to the guardians *ad litem* the right to seek reconsideration of that ruling by submitting additional affidavits setting forth a detailed description of the "miscellaneous" research. Upon the filing of such affidavits by the guardians *ad litem*, the district court will decide what part, if any, of the guardians' fee for "miscellaneous" research is taxable against Lockheed. (Id. 17a.)

Further reducing the guardian *ad litem* fees taxable against Lockheed, the district court ruled that the settlements in the *Wright, Reynolds,* and *Casper* cases were inclusive of any claim against Lockheed for fees of the guardian *ad litem* attributable to services rendered in those cases. The district court's January 27 Order provides accordingly that Lockheed will receive an additional credit of $72,036 against the guardian *ad litem* fees previously taxed against it in *Schneider, et al.* (Id. 18a.)

The present status of the now pending proceedings respecting the fees of the guardians *ad litem* is, therefore, that the district court on January 27, 1982, ordered that the guardians *ad litem* may recover from Lockheed a reduced fee of $222,510. Under the terms of the Court's Order, however, the guardians *ad litem* may seek reconsideration of the court's reduction of their fees attributable to "miscellaneous" research.

As further evidence that the propriety of taxation against Lockheed of fees for the guardian *ad litem* is still unsettled in the courts below, there is now pending before the district court plaintiffs' Motion to Impose Sanctions, which was filed in the district court on October 28, 1981. By that motion, plaintiffs have sought the imposition of sanctions against Lockheed and the government, pursuant to Rule 37 of the Fed.R.Civ.P., for extensive and egregious discovery violations. Plaintiffs contend that Lockheed and the government answered interrogatories falsely and knowingly withheld au-

topsy reports, two movies, and roughly one thousand photographs of the C5A crash scene, and that scores of other pictures and other critical evidentiary materials have been withheld or intentionally destroyed since the filing of this action and plaintiffs' first request for production. The recently produced movies and photographs were not produced until September 15, 1981, more than six years after the crash and well after the trials in *Schneider, Marchetti,* and *Zimmerly.* Sanctions sought to be imposed include the expenses of the litigation, one item of which is the fees and expenses of the guardians *ad litem*.

REASONS FOR DENYING THE WRIT

Because the court of appeals remanded the case and because there are related proceedings presently pending in the district court, the issues raised by Lockheed's petition are not ripe for review by this Court. The decision below is correct and consistent with prior decisions of this Court. There are no conflicting decisions of the courts of appeals or district courts. The decision below is in accord with other cases deciding the issue of taxation of guardian *ad litem* fees. Lockheed's Petition raises disputed factual issues, decided against Lockheed in the lower courts, which are relevant only to the proper exercise of discretion by the district court in this unique case—not to the district court's authority in the first instance. This Court does not grant certiorari to decide facts in individual cases; and, moreover, the specific factual issues in this unique case are not likely to recur in other litigation. This Petition does not broadly concern the issue of taxation of nonstatutory costs in the federal courts.

I. BECAUSE MANY OF THE ISSUES PRESENTED BY LOCKHEED'S PETITION ARE *SUB JUDICE* BELOW, THOSE ISSUES ARE NOT RIPE FOR REVIEW BY THIS COURT

Because the court of appeals remanded this case for retrial, the judgment of the district court is not final as to taxation of

the guardian *ad litem* fees and expenses. In recognition of this and in light of the court of appeals' instructions (*supra*, p. 10), note 14), the guardians *ad litem* filed a Motion for Partial Summary and Final Judgment in the district court on July 22, 1981. Just a few days ago, the district court, on January 27, 1982, entered an Order and Partial Judgment and Memorandum (Resp. App. 1a-19a.) in which the court ordered Lockheed to pay the fees of the guardians *ad litem* in the reduced amount of $222,510, subject to reconsideration of the taxation of additional fees for certain "miscellaneous" legal research. Moreover, the district court has not yet decided plaintiffs' October 28, 1981 motion for sanctions, which *inter alia* seeks an order taxing against Lockheed and the government the fees and expenses of the guardians *ad litem*, based upon discovery violations.

Until the fee and sanction proceedings now pending in the district court are concluded and final judgment is entered therein or until the *Schneider* and *Zimmerly* cases are actually retried and final judgment is entered therein taxing the guardians' fees and expenses against Lockheed, the issue of taxation of some or all of the guardian *ad litem* fees and expenses, and against whom the fees and expenses will be taxed (or imposed as a sanction), has not yet been finally decided by the lower courts. Furthermore, many or all of the issues raised by Lockheed's petition may become moot as a result of further proceedings below.

Except in extraordinary cases, a writ of certiorari will not normally be granted until a final judgment has been entered by the district court and until appellate review proceedings have been exhausted below. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1915). In *Brotherhood of Loc. Fire & Eng. v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967), a case analogous to the present case, the Court denied certiorari to review certain issues decided against the petitioner by the court of appeals, because the court of appeals had remanded

the case on other issues to the district court. The Court held: ". . . because the Court of Appeals remanded the case, it is not yet ripe for review by this Court," citing *Hamilton-Brown Shoe, supra.*

The issues raised by Lockheed's petition should be reviewed in the normal course by the court of appeals, after final judgment has been entered in the district court, prior to review by this Court. This Court may never need to review this matter.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *ALYESKA PIPELINE* OR *ROADWAY EXPRESS*

Lockheed argues that the court of appeals' decision conflicts with *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) and *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), because the fee of a guardian *ad litem* is not statutorily authorized as a taxable item of cost.

However, as held by the court of appeals (Pet. App. 40a), a guardian *ad litem's* fee is not an "attorney's fee" subject to the proscription of *Alyeska* and courts have traditionally treated a guardian *ad litem* fee as an item of taxable cost. *Franz v. Buder*, 38 F.2d 605 (8th Cir. 1930); *Panitch v. Wisconsin*, 451 F.Supp. 132 (E.D. Wisc. 1978); *Eaton v. Karr*, 251 A.2d 640 (D.C. App. 1969).

In *Franz v. Buder*, the court of appeals stated:

> Federal Equity Rule 70 (28 USCA § 723) provides for the appointment of a guardian ad litem for infants and other persons who are under guardianship, subject to such orders as the court or judge may direct for the protection of infants and such other persons as are not sui juris. *A guardian ad litem is, in a sense, an officer of the court made necessary by the litigation, and a federal court of equity, without any reference to specific statutory authority, has jurisdiction and authority to award costs.* That, as such officer of the court,

> allowances made him are properly taxable as costs, is sustained by the authorities. Ex parte Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919; Newton v. Consol. Gas Co., 265 U.S. 78, 44 S.Ct. 481, 68 L.Ed. 909; Guardian Trust Co. v. K.C.S. Ry. Co. (C.C.A.) 28 F.(2d) 233. Being of the view that the compensation for a guardian ad litem is properly taxable as costs, it follows that such fees should have been assessed against the trustees individually, pursuant to the decision of this court in Buder v. Franz, 27 F.(2d) 101, supra, the rule there announced being the law of the case. (Emphasis supplied.)

38 F.2d at 606.

In *Panitch v. Wisconsin*, a civil rights action brought under 42 U.S.C. § 1988, a three-judge district court held that its order taxing the fee of a guardian *ad litem* for an infant plaintiff as costs against the defendants was not based on § 1988, but was based upon the court's equity powers. The three-judge court held:

> The guardian *ad litem* has also applied for an allowance of fees. Although R. 17(c) is silent on the subject, we believe that an award for the reasonable value of services provided by the guardian *ad litem* may be taxed as costs against all of the defendatns, jointly and severally. Such an award is not made pursuant to § 1988, but rather as a necessary consequence of the court's equitable responsibility to protect the interests of minor litigants who cannot protect themselves. *Mutual Life Ins. Co. of New York v. Ginsburg*, 228 F.2d 881 (3rd Cir. 1956).

451 F.Supp. at 136.

Similarly, in *Eaton v. Karr*, the District of Columbia Court of Appeals affirmed the trial court's order assessing as court costs an allowance for compensation and out-of-pocket expenses of a guardian *ad litem* for infants in a divorce and custody proceeding.

Mr. Work and his firm were appointed pursuant to Fed.R. Civ.P. 17(c) as "officers of the court" for the purpose of "advising one or more parties as well as the court." (Pet. App. 41a, 74a.) The discretion to tax guardian *ad litem* fees as costs is implicit under Rule 17(c) and inherent in the district court's power. This inherent discretionary authority is not inconsistent with the Court's ruling in *Roadway Express, Inc.*, not only because *Roadway Express* applies exclusively to attorney's fees, but also because the Court recognized, as it had in *Alyeska*, that such inherent authority exists in certain "narrowly defined circumstances." The Court in *Roadway Express* stated:[16]

> Roadway also contends that the District Court's ruling was a proper exercise of the court's inherent powers. The inherent powers of federal courts are those "which are necessary to the exercise of all others." *United States v. Hudson and Goodwin*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812). The most prominent of these is the contempt sanction, "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court . . ." *Cooke v. United States*, 267 U.S. 517, 539, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925); see 4 W. Blackstone, Commentaries on the Law of England *282-*285 (1769). Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450-451, 31 S.Ct. 492, 501-502, 55 L.Ed. 797 (1911); *Green v. United States*, 356 U.S. 165, 193-194, 78 S.Ct. 632, 648, 2 L.Ed.2d 672 (1958) (Black, J., dissenting). There are

16. Lockheed argues that the Court's decisions in *Ex parte Peterson*, 253 U.S. 300 (1920), relied on by the court of appeals in *Franz v. Buder, supra*, and *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1967), are incompatible with the Court's more recent decisions in *Alyeska* and *Roadway Express*. Both *Alyeska* and *Roadway Express* dealt solely with non-statutory attorney's fees and neither is incompatible with the Court's recognition of "inherent powers" in *Ex parte Peterson* and *Farmer*.

> ample grounds for recognizing, however, that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel.

100 S.Ct. at 2463.

It is implicit in Rule 17(c) appointments that the district courts must have the discretion to tax the guardian *ad litem's* fee and expenses against either party. In the absence of such discretion, the court in many cases would be unable to obtain the services of a competent guardian *ad litem*, because the court would be powerless to compensate the guardian *ad litem*. As the district court has most recently held in the proceedings now pending in the district court on the guardian *ad litem's* motion for partial summary and final judgment:

> "The authority of the Court to award a reasonable fee to the guardian *ad litem* is implied from the power to appoint him, a power which Fed.R.Civ.P. 17(c) undoubtedly gives the Court. This fee may be properly taxed as costs, since it is an expenditure necessary to the performance of the judicial function. *Hoffman v. Morgan*, 206 Okla. 567, 245 F.2d 67 (1952). This practice of taxing the fees of the guardian *ad litem* as costs is not only supported by federal precedents such as *Franz* and *Panitch, supra*, but is also followed in a great many states. *See generally* Annotation, *Allowance of Fees for Guardian Ad Litem Appointed for Infant Defendant as Costs*, 30 A.L.R. 2d 1148 (1953). Such a practice is consistent with the "American rule" that compensation for prevailing counsel is not normally taxable as a cost. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Rather, this expense is more like the fee paid to an auditor to which a case is referred for a preliminary hearing, which was held to be taxable as costs in *In re Peterson*, 253 U.S. 300 (1920). Thus, a defendant who admits liability for the crash necessarily admits responsibility for the costs of the guardian *ad litem* made necessary by that crash." (Resp. App. 11a-12a.)

The discretionary power to tax a guardian *ad litem* fee as costs is a recognized and necessary power. *Franz v. Buder, supra*; *Panitch v. Wisconsin, supra.* Therefore, the lower court's decision is entirely consistent with this Court's decisions in *Alyeska* and *Roadway Express.*

III. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Lockheed's petition incorrectly represents that the decision below is in conflict with decisions of other courts of appeals. In the first place, none of the cases relied on by Lockheed to establish a conflict involves the fees of a guardian *ad litem*. In the second place, the decisions relied on by Lockheed to establish a conflict, most of which involve taxation of fees of experts, are reconcilable based on the facts of the particular cases.

In *Wehr v. Burroughs Corp.*, 477 F.Supp. 1012 (E.D.Pa. 1979), an action under the Age Discrimination in Employment Act, the Court of Appeals for the Third Circuit, 619 F.2d 276 (1980), affirmed the district court's decision to disallow as costs plaintiff's expert witness fees (as well as telephone charges, travel expenses and the costs of meals and trial exhibits) because these expenses are not expressly authorized by 28 U.S.C. § 1920. However, referring to the taxing of expert witness fees as costs, the district court has stated:

> . . . There have been exceptions made to this rule in cases where the expert's testimony was "helpful to the Court and played an important role in the resolution of the issues." *See e.g., Commonwealth of Pennsylvania* v. *O'Neill*, 431 F.Supp. 700, 713 (E.D.Pa. 1977), and cases cited therein. However, this exception would not apply where the expert does not testify at trial. Therefore, we will disallow the amount requested by plaintiffs as reimbursement for expert witness fees.

477 F.Supp. at 1022.

Wehr did not present the circumstances under which the district court would have taxed expert witness fees as costs under the limited exception discussed in the above dictum. Therefore, the court of appeals did not decide the issue of taxation of expert witness fees as costs "where the expert's testimony was helpful to the Court and played an important role in the resolution of the issues." The Third Circuit did, however, decide this issue in *Roberts v. S.S. Kyriaboula D. Lemos*, 651 F.2d 201 (1981), stating: ". . . *Farmer* [*v. Arabian American Oil Co.*, 379 U.S. 227 (1964)] affords a district court equitable discretion to award expert fees when the expert's testimony is indispensable to determination of the case." 651 F.2d at 206.

In *Jones* v. *Diamond*, 636 F.2d 1364 (5th Cir.1981), *cert. granted sub nom. Ledbetter v. Jones*, 69 L.Ed.2d 970, 993 (1981), *cert. dismissed*, 50 U.S.L.W. 3211, also cited by Lockheed, the court of appeals held that the usual rule in civil litigation in the federal courts is that expert witness fees are not recoverable as costs. However, *Ledbetter* presented special circumstances which prompted the Fifth Circuit to affirm the district court's exercise of its inherent power to tax as costs expert witness fees. In accord with the Third Circuit in *Roberts*, the Fifth Circuit held:

> . . . District Courts in many instances have awarded the full fees of experts on the ground that their testimony and assistance were necessary or helpful in representing clients in civil rights litigation. (case citations omitted.)

636 F.2d at 1382.

The only decision of a court of appeals cited by petitioner which on its face appears to conflict with the Third Circuit's decision in *Roberts* and the Fifth Circuit's decision in *Ledbetter* is the Seventh Circuit's decision in *Adams v. Carlson*, 521 F.2d 168 (1975). The Seventh Circuit in *Adams* affirmed the district court's denial of an award of expert witness fees in that case, as not expressly authorized by 28 U.S.C. § 1920. However, the

Seventh Circuit, in a later decision, observed that an expert's fee may be taxed as costs. In *State of Illinois v. Sangamo Const. Co.*, 657 F.2d 855 (7th Cir. 1981), an action under Section 4 of the Clayton Act, the court disallowed taxation of expert witness fees in the case before it, but stated:

> Courts retain some discretionary authority to award costs not specifically provided for by statute. *Farmer v. Arabian American Oil Co.*, 379 U.S. at 235, 85 S.Ct. at 416. *But, as Farmer indicated, such authority should be "sparingly exercised." This discretionary authority is particularly narrow where a party seeks recovery of costs in excess of the amount explicitly provided by statute for that item.* It is difficult to reconcile a specific statutory scheme of witness fees and disbursements with discretionary awards of fees in excess of the statutory amounts. Therefore, with respect to witness fees, the only recoverable costs under Rule 54(d), *except in exceptional circumstances*, are those specified in 28 U.S.C. § 1821. Such exceptional circumstances have not been established *in this case.* (Emphasis supplied.)

657 F.2d at 865, note 14.

Lockheed additionally cites as "conflicting cases" the courts of appeals decisions in *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964) (disallowance of accounting expenses incurred by plaintiff in preparing its case), the *United States v. Pommerening*, 500 F.2d 92 (10th Cir.1974) (disallowance of per diem and lodging expenses incurred by marshall in trar.sporting non-testifying FBI agent), and *United States v. Vaughn*, 636 F.2d 921 (4th Cir. 1980) (disallowance of expense of criminal investigation). However, the *Goldwyn, Pommerening* and *Vaughn* cases may be reconciled with decisions of the Third, Seventh and Fifth Circuits in that these cases did not involve the taxation of expert witness fees under "exceptional circumstances" in which the inherent power of the district courts to tax nonstatutory costs was invoked.

Contrary to Lockheed's representation, the courts of appeals, including the courts of appeals for the Third, Fifth and Seventh Circuits, all observe the rule restated by this Court in *Roadway Express* that non-statutory costs are not taxable, absent unusual circumstances which justify the exercise of the district court's inherent powers.

It is true, as Lockheed points out, that this Court granted certiorari to review the Fifth Circuit's decision in *Ledbetter* that expert witness fees may be taxed as costs in certain exceptional cases. It does not follow, however, that certiorari should be granted in the instant case because *Ledbetter* was dismissed pursuant to Rule 53 of the Rules of this Court.

Ledbetter presented the narrow issue of the taxation of *expert witness fees* in "exceptional cases." That narrow issue should be decided in a case in which the same issue is squarely presented. Unlike *Ledbetter*, the present case involves taxation of a guardian *ad litem's* fee, pursuant to the district court's inherent power implicit in the appointment of guardians *ad litem* pursuant to Fed.R.Civ.P.17(c). The power to tax as costs the fees and expenses of a guardian *ad litem* may well be necessary to compensate a guardian *ad litem*.

A closely related distinction between the present case and *Ledbetter*, and all other cases cited by Lockheed in which non-statutory costs were taxed, is that the fees and expenses of a guardian *ad litem* are not expenses of litigation directly incurred by an opposing party. The lower court thus observed that unlike the private attorney in *Alyeska*: ". . . a guardian is not simply counsel to one party in the litigation, but instead plays a hybrid role, advising one or more parties as well as the court." (Pet. App. 41a.) It is the unique role of the guardian *ad litem* that underlies the historical recognition of the inherent power of the district court to tax as court costs a guardian *ad litem's* fee as a necessary corollary to the district court's authority to appoint guardians *ad litem*. Accordingly, the narrow

issue presented by Lockheed's Petition does not, contrary to Lockheed's suggestion, broadly concern the issue of the taxation of nonstatutory costs.

Lockheed cites no case in which a court of appeals has reversed a district court's taxation of a guardian *ad litem's* fee as costs.[17] There are no lower court decisions that conflict with the decision in the present case.

IV. THE DECISION BELOW DOES NOT VIOLATE THE AMERICAN RULE

Lockheed takes issue with the distinction drawn in the lower court between taxation of the fee of a guardian *ad litem* for the performance of legal services and the taxation of an opposing party's "attorney's fee." The court below carefully reviewed the record of the services performed by the guardians *ad litem* and concluded:

> "Under the circumstances, the Court appropriately gave the guardian wide power to monitor, investigate, and report on, inter alia, possible conflicts within and among the involved families. Some of these responsibilities reasonably included legal research and analysis. Thus, the cost award was not simply another "form" of the practice banned in *Alyeska, compare Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974). Instead, the allowance of legal expenses was within the trial court's discretion in permitting the guardian to meet his extensive obligations to the court. . . ." (Pet. App. 42a.)

The court of appeals correctly held that the district court did not violate this Court's decision in *Alyeska* by taxing the fee of the guardians *ad litem* for legal services that were performed in the interests of the infant plaintiffs. As the court

17. Moreover, Lockheed cites no district court's decision holding that a district court has no authority to tax as costs the fee of a guardian *ad litem*. In *Panitch* v. *Wisconsin, supra*, p. 16, the three-judge court in the exercise of its discretion taxed the guardian *ad litem's* fee against the defendants.

noted, "a guardian is not simply counsel to one party in the litigation, but instead plays a hybrid role, advising one or more parties as well as the court." (Id. 41a.) Moreover, the plaintiffs are the "prevailing parties" in this litigation, *infra*, p. 25-26.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN TAXING AS COSTS THE GUARDIAN *AD LITEM'S* FEES AND EXPENSES

Lockheed raises numerous issues that relate, not to the district court's power to tax as costs the guardian *ad litem* fees and expenses, but rather to whether the district court properly exercised its power under the facts of the instant case. These issues arise by virtue of the very unique and complex nature of this litigation, that is: an air crash case in which 150 orphaned, now adopted children are suing an aircraft manufacturer which has stipulated to its liability but denies that the children were injured in the crash.

a. Dispute as to reasons for the appointment of the guardians *ad litem*

Lockheed misstates the facts of this case in its Petition by repeatedly asserting that plaintiffs, rather than Lockheed, was responsible for the appointment of the guardians *ad litem*. Lockheed represents (Petition, p. 8):

> "Although the appointment of the guardians—to "cure" FFAC's defects in representational capacity (see note 4, *supra*)—was also occasioned by the plaintiffs' rather than Lockheed's conduct, the court of appeals nevertheless ruled that the district court "did not abuse its discretion in taxing costs against Lockheed for the guardians *ad litem* services. . . ." (Pet. App. 42a.)

Lockheed initially sought to take advantage of the infant plaintiffs' uncertain legal status in seeking dismissal of the action. Having failed in this effort, Lockheed now seeks to disassociate itself from that initial strategy to avoid altogether

responsibility for the curative measures necessarily taken to protect the infants *and Lockheed.* Lockheed's position is particularly incredible in light of Lockheed's agreement not to contest liability for compensatory damages and its use of the guardians *ad litem* when it has been in its own interest to do so, e.g., stipulations and settlement.

In the exercise of its discretion, the district court taxed the fees and expenses of the guardians *ad litem* against Lockheed and in favor of plaintiffs as "prevailing parties." Lockheed asserted in the lower court, and again in the fee proceedings now pending in the district court on the motion of the guardians *ad litem* for partial summary and final judgment, that the plaintiffs are not the "prevailing parties." Rejecting Lockheed's argument for the second time, the district court wrote in its Memorandum accompanying its Order and Partial Judgment of January 27, 1982:

> "The Court concludes, as the Court of Appeals indicated, that defendant is primarily responsible for compensating the guardian. * * * The defendant has agreed not to contest its liability for damages proximately caused by the crash. The cost of the services of a guardian is one such liability. * * * Actually, a guardian should have been appointed at the beginning of this litigation. *See, e.g., Franz v. Buder*, 38 F.2d 605 (8th Cir. 1930) (under Equity Rule 70, from which Fed.R.Civ.P. 17(c) is derived). In any air crash as violent as this one, which carried 144 passengers to their deaths, it should be clear that one proximate result of the crash is that any infants who are aboard the plane require a guardian *ad litem* to protect their interests.
>
> * * *
>
> Since plaintiffs are all prevailing parties, defendants are liable for these costs. This would be true even if a plaintiff

had recovered only nominal damages. *See Chesapeake and Potomac Tel. Co. v. Clay*, 90 U.S. App. D.C. 206, 134 F.2d 888 (1952); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 328 F.2d 993 (5th Cir. 1975). But in these cases, each plaintiff has recovered $5,000 as a result of the aforementioned stipulation, and is thus *a fortiori* a prevailing party and entitled to costs, whether or not he recovers further amounts at trial. Plaintiffs have also secured the defendant's agreement to pay 30% of any judgment without awaiting appeal; several plaintiffs have already recovered these amounts. Several others have gained substantial recoveries by settlement." (Resp. App. 10a-13a.)

b. Dispute as to the propriety of taxing fees for certain services as costs against Lockheed

Lockheed argues that the services performed by the guardians *ad litem* included "legal research" which should have been performed by plaintiffs' counsel. Lockheed recites at length (Petition, p.p. 5-6) certain of the services performed by the guardians *ad litem* in support of its repeated assertion that the role of the guardians *ad litem* was that of Lockheed's "adversary" performing "partisan" legal services.[18] So characterized, Lockheed argues, the services are no different from legal services otherwise performed by plaintiffs' counsel. In the

18. Among the legal issues which have been necessarily addressed by the guardian *ad litem* are:

(1) the obligation of the guardian *ad litem* with respect to children for whom amended complaints have not been filed because the parents do not desire to participate in the proceedings;

(2) whether dismissal is appropriate in the cases of children on whose behalf amended complaints have not been filed;

(3) the obligation of the guardian *ad litem* toward children whose parents do not consent to diagnostic examination and treatment; and

(4) how settlement or judgment monies shall be administered, the establishment of trusts, and restrictions on the investment of funds.

Guardian *Ad Litem's* Motion For Partial Summary and Final Judgment, dated July 22, 1981.

proceedings now pending in the district court on the guardian *ad litem's* motion for partial summary and final judgment, the district court conducted a comprehensive review of the guardian *ad litem* services and concluded that the guardian *ad litem's* fee for some legal research should be taxed against Lockheed but that the guardian *ad litem's* fee for other legal research should not be so taxed. The court of appeals noted that the responsibilities of the guardian *ad litem*, under the specific facts of this case, "reasonably included legal research and analysis." (Pet. App. 42a.)

Lockheed also asserts, contrary to the findings of the district court, that the guardian *ad litem* services were devoted in substantial measure to persuading people to sue Lockheed and were not beneficial to Lockheed. These statements border on an intentional distortion of the true nature and scope of the guardian *ad litem's* services. Lockheed fails to list numerous of the services performed by the guardian *ad litem*. For example, Lockheed did not mention that, *by agreement with Lockheed*, the guardian *ad litem* was to give notice to the parents and was to administer the fund established by the Stipulations of September 14, 1979. Nor does Lockheed mention the numerous court appearances made of necessity by the guardian *ad litem*. As noted by the district court: "Many of the court appearances of the guardian were at the specific request of this or other courts, and related to conferences about settlement negotiations and scheduling, important responsibilities of the guardian in this case." (Resp. App. 15a.)

Lockheed suggests, moreover, that the continued participation of the guardian *ad litem* in this litigation after the adoptive parents joined in the case was improper and unwarranted. (Petition, p. 4-5.) The district court, in appointing the guardian *ad litem*, directed him to "take whatever other action he deems necessary or appropriate, including continued representation of all surviving infants." The guardian's continued participation has been necessary, contrary to Lockheed's as-

sertion, to represent not only the children whose parents have not yet joined the litigation but also the children whose parents have joined the litigation to insure that the adoptive parents' interests do not conflict with the interests of the children. Moreover, the guardian *ad litem* has played a central role in settlement negotiations. Indeed, in several cases, Lockheed required that the guardian *ad litem* and his firm indemnify Lockheed with respect to settlements. The district court observed that "the guardian has taken an active role in settlement negotiations, both in individual cases and on a global basis." (Resp. App. 9a.)

e. Dispute as to payment of the guardian *ad litem's* fee out of the plaintiffs' individual recoveries

Lockheed argues (Petition, p. 19) that it would be "more fitting" in the present case to pay guardian *ad litem* fees and expenses out of the plaintiff's recovery. The district court determined, however, that it was appropriate in these cases to tax the guardian *ad litem's* fees and expenses as costs against Lockheed inasmuch as Lockheed, by its own admission, caused the crash and is, therefore, responsible for all liabilities of the plaintiffs' that are the proximate consequence of the crash. As the Court observed: "it should be clear that one proximate cause of the crash is that any infants who are aboard the plane require a guardian *ad litem* to protect their interests." (Resp. App. 11a.)

CONCLUSION

The Petition for Writ of Certiorari should be denied. Many of the issues raised in Lockheed's petition are now *sub judice* below, and it would be premature for this Court to grant *certiorari* prior to final resolution of those issues by the District Court and completion of the normal appellate review process. In any event, based on the unique and exceptional circumstances present in this case, the district court had the inherent power implicit in Rule 17(c) to tax as costs against Lockheed the fees and expenses of the guardians *ad litem*. The issues presented by Lockheed's petition are largely factual and relate largely to whether the district court properly exercised its discretion under the peculiar facts of this case. In *United States* v. *Johnson*, 268 U.S. 220, 227 (1925), this Court ruled: "We do not grant a certiorari to review evidence and discuss specific facts." This Court should reserve its time for cases of greater general interest. It has now been almost seven years since the April 4, 1975 crash and more than two years since the execution of the September 14, 1979 Stipulations, which were "solely and unconditionally intended to accomplish the fair and expeditious compensation of those children injured." Lockheed's efforts to delay this litigation further by proceedings in this Court should be denied.

Respectfully submitted,

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February 6, 1982

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS FOR ALL CHILDREN, INC., as legal guardian and next friend of the named 150 infant individuals *et al.*,
Plaintiffs,

v.

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

Civil Action No. 76-0544

ORDER AND PARTIAL JUDGMENT

For the reasons stated in the accompanying Memorandum, it is this 27th day of January 1982 hereby

ORDERED AND ADJUDGED: That Charles R. Work and Peabody, Rivlin, Lambert & Meyers have and recover of defendant Lockheed Aircraft Corporation the sum of Two Hundred Twenty-Two Thousand Five Hundred Ten Dollars ($222,510.00), together with interest from the date of judgment, as costs in the above-captioned case; and it is further

ORDERED: That a hearing will be held on February 5,

1982, at 9:30 a.m., at which time any of the plaintiffs in the three settled cases may show cause why one-half of the amounts set aside for the guardian *ad litem* or to be set aside for the guardian *ad litem* should not be disbursed to the guardian.

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS FOR ALL CHILDREN, INC., as legal guardian and next friend of the named 150 infant individuals, *et al.*,

Plaintiffs,

v.

Civil Action No. 76-0544

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Third-Party Defendant

MEMORANDUM

The pending motion requires a decision on the amount of compensation owed by defendant Lockheed Aircraft Corporation and the United States, as third-party defendant, to Charles Work, Esq. and his law firm for their services from February 23, 1978 through May 18, 1981, totaling 3,992.5 lawyer hours and 1,449.8 non-lawyer hours, as guardian *ad litem* for 150 infants. The infants were orphaned in Viet Nam and cared for by Friends For All Children ("FFAC"), a non-profit Colorado corporation which operated orphanages in

Viet Nam, and arranged for adoption of its wards outside of Viet Nam. Just before the end of the Viet Nam War, then President Ford ordered the Air Force to send a Lockheed-manufactured C-5A to Viet Nam to evacuate to the United States several hundred orphans scheduled by FFAC for adoption in the United States and Western Europe. Shortly after take-off of the C-5A from Saigon with 327 passengers, including 258 orphans, the rear cargo door broke off. There was an explosive decompression at about 23,000 feet altitude, followed about 10 minutes later by a crash landing in a rice paddy on the approaches to the military airport at Saigon. One hundred forty-four persons including adult crew personnel and escorts for the orphans died; 150 orphans survived. Most of those killed were traveling in the cargo compartment of the C-5A, while most of the survivors were in the troop compartment, which held the majority of the orphans being evacuated.

On April 2, 1976, FFAC filed this suit as legal representative of the 150 surviving infants. While pretrial proceedings were in an early stage, the Panel for Multi-District Litigation transferred here several other cases growing out of the crash brought by and on behalf of U.S. citizens who were aboard the C-5A against Lockheed in federal courts around the country.

Until February 1978, while discovery proceeded concerning liability, the Court and defendant's counsel dealt primarily with the cases involving adult U.S. citizens and gradually settled all except three which were remanded to the Southern District of New York for trail. These infant cases first became active, independent of the U.S. citizen cases, as a result of discovery disputes and defendant's attacks on FFAC's standing and credentials. Although defendant explained the lack of settlement of infant cases, in part at least, as resulting from FFAC's inability to effect settlements binding on the infants it represented, no one suggested the appointment of a guardian *ad litem* to represent the infant plaintiffs, and the idea did not

occur to the Court. There being no guardian *ad litem*, in February 1978 FFAC's counsel, in order to perfect the claims of the infants asserted protectively for them by FFAC, wrote to each parent of an adoptive child that FFAC had filed the suit on its own for the benefit of the orphans. The letter suggested that the adoptive plaintiffs now substitute themselves for FFAC as legal representatives in the present cases. The letter further suggested that each plaintiff retain FFAC's lawyer, without thoroughly relating the costs and risks involved or suggesting the possibility of alternative counsel. One of the adoptive parents, Yul Brynner (then living in Paris) communicated with the Justice Department and denounced the FFAC lawyers for suggesting that Brynner's adopted child might be ill and for filing a lawsuit for the child's benefit without parental consent. Thereafter, the United States moved to disqualify FFAC's lawyers for improper solicitation and Lockheed moved for summary judgment dismissing the suits because FFAC lacked capacity to represent the infants. Again, there was no suggestion of a guardian *ad litem*.

The Brynner letter, the United States' motion to disqualify plaintiffs' counsel, and the motion for summary judgment raised novel and serious questions. The standards governing lawyers' advertising and communicating with clients were in a state of flux. *See, e.g., Obralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978). The District of Columbia Bar was in the process of developing new rules on the subject to reflect recent Supreme Court decisions. Charles R. Work was recently President of the D.C. Bar and closely involved in adopting standards governing lawyer advertising and solicitation. He had a good reputation for ability and was well regarded by other judges of this Court as a result of his services as Assistant United States Attorney.[1] Accordingly, the

1. Defendant itself complained that the guardian *ad litem* inappropriately supplemented legal services rendered by plaintiffs' counsel, and referred to the guardian *ad litem* as "a distinguished lawyer and a prestigious law firm," Petition for Rehearing and Clarification, page. 4.

Court appointed Mr. Work as *amicus curiae* to consider the various complications generated by the unusual stance of plaintiffs, their representatives and their counsel, and to advise whether the complexities could and should be resolved by the appointment of a guardian *ad litem*.

In due course, Mr. Work advised that in his opinion communication from FFAC counsel to the adoptive parents did not violate any professional standard and was appropriate in these circumstances, but that appointment of a guardian *ad litem* was indicated and would, in effect, moot the issues raised by Lockheed's summary judgment motion. After receiving briefs from the parties and conducting a hearing on the amicus' recommendations, the Court denied the motion for summary judgment and, over vigorous objections by defendant, appointed Mr. Work and his firm as guardians *ad litem*.

The guardian's first task was to design and send to adoptive and *de facto* parents of infants a thorough notice of their claims, and a full appraisal of the medical and legal circumstances of the infants who had survived the crash. The Brynner letter and changing professional norms sensitized all involved to the delicacy of the communication, and the necessity that it be complete, candid, and, where appropriate, followed up by personal conferences between the guardian *ad litem* and the adoptive parents, here and abroad. This was no ordinary commission as guardian *ad litem*. And the subsequent responsibilities for 150 wards, scattered across the United States and Europe, and involved in a bitterly-contested, complex litigation, have also been extraordinary for a guardian *ad litem*.

Thereafter, the guardian submitted to the parties and the Court several drafts of a communication. The hearings on those drafts quickly disclosed an underlying concern of the defendant (or at least its insurance carrier). The defendant endeavored to shape the communication to individual parents

and the resulting arrangements so that defendant could deal directly with each plaintiff or potential plaintiff.[2]

After defendant had sought unsuccessfully to persuade the Court of Appeals to prohibit or mandamus this Court on these issues, and following lengthy negotiations, the parties agreed upon an interim settlement in which Lockheed agreed not to contest its liability for damages proximately resulting from the crash in exchange for plaintiffs' agreement not to seek punitive damages. Defendant also agreed to pay $5,000 for each child who filed an amended complaint, with the fund so created being used for medical examinations and expenses and for litigation expenses. Finally, defendant agreed to pay 30% of any judgment without awaiting appeal. *See* Stipulation of September 14, 1979.

The cases of three infants were then selected as "bellweather" cases and were tried in the Spring of 1980. Following a retrial of one of the cases in January 1981, the cases were reviewed in expedited appeals, and sizeable judgments for the three infant plaintiffs were reversed and remanded for new trials, the plaintiffs retaining 30% of each judgment pursuant to the 1979 settlement. *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981).[3]

After the first three trials and before the judgment of the Court of Appeals, this Court conducted hearings on a Motion for a Preliminary Injunction, filed by plaintiffs and their guardian *ad litem*, to require the defendants to establish a fund to provide for medical needs of the infants while their suits

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2. Defendant complained to the Court of Appeals that the guardian *ad litem* here is not rendering "the services traditionally rendered by a guardian *ad litem*. . ." but is rendering "services intended and designed to increase the number of plaintiffs and to reduce Lockheed's chances of success in the litigation."

3. A petition for certiorari in *Schneider* was filed by defendant on January 7, 1982. This, of course, does not affect this Court's duty to decide the instant motion in this case which was filed on July 22, 1981.

were being litigated. This motion was held under advisement while the parties negotiated and tentatively agreed upon an interim trust to serve this purpose. This agreement was, however, subject to approval by higher level Justice Department officials. The settlement was only recently rejected by these officials.

This Court's Calendar Committee then established a procedure whereby, following completion of discovery, the remaining cases could be reassigned randomly to other judges of this Court. Such reassignments were completed and several additional cases were tried and three settled in the Winter and Spring of 1981. All of the judgments based on trials had to be vacated, however, after the Court of Appeals' decision in May 1981, so that only the final judgments in the three settled cases remained standing. In view of the number of cases remaining to be tried and the need for coordination between various judges over trial schedules, this Court issued an *en banc* Order on July 31, 1981, which provided that these cases would be tried one per month as long as necessary, beginning January 1982 with no judge trying more than one case per year. The retrial of one of the three cases reversed by the Court of Appeals was scheduled for the Fall of 1981, but that case was settled, bringing to four the number of cases that were finally resolved as of January 1, 1982, and two in which 30% of a judgment for plaintiff was final.

Also during the Fall of 1981, there were substantial discussions of a global settlement, also involving a trust, for all cases of infants who were adopted by parents residing in the United States. In addition, the defendant and the third-party defendant moved to dismiss the cases of the infants residing overseas on the basis of *forum non conveniens,* but this motion was denied by this Court. *See* Memorandum of October 2, 1981.

Since his appointment, the guardian *ad litem* has carried out his duties by, *inter alia,* (1) contacting parents of individual

plaintiffs, both domestic and foreign, about their participation in these cases, both by the carefully designed notice procedure, and in some cases by personal visit or telephone; (2) arranging and supervising medical examinations to determine the severity of injuries for purposes of the pending claims, the need for treatment of individual plaintiffs, and the prospect of diagnosis and treatment for the plaintiffs as a group having similar medical problems and similar medical and educational requirements; (3) administering a Guardian's Fund, originally established by the defendant's payment of $5,000 to each individual plaintiff who has filed an amended complaint, pursuant to the stipulation entered into on September 14, 1979, and thereafter supplemented with sums paid out of amounts paid into Court in cases which have settled or in which amounts were paid in partial satisfaction of judgments which were later reversed on appeal. These funds have been used both for the conducting of medical examinaions and for the provision of litigation expenses. The guardian has also monitored the performance of plaintiffs' counsel and, where necessary, conferred with counsel on strategy and settlement posture. Finally, the guardian has taken an active role in settlement negotiations, both in individual cases and on a global basis.

As one example of the complexity of the tasks of the guardian, there were lengthy negotiations between plaintiffs and both defendant and third-party defendant which led to a partial settlement in which Lockheed agreed not to contest liability in exchange for plaintiffs' agreement not to seek punitive damages. Moreover, there were substantial discussions in 1980 about the possibility of a second partial settlement to provide medical treatment for the immediate needs of the infants while the cases were being litigated. This involved substantial research on the methods of administering such a settlement, including the establishment of a fluid trust which could be drawn on by all of the infants as they needed the treatments available. There were numerous questions about

the mechanics of such a trust, its tax treatment, and possibly even its legality. As indicated, agreement on the issue was reached by counsel, but the settlement documents were held in abeyance for about 15 months and finally rejected by third-party defendant. Clearly these negotiations required substantial financial and legal work which transcended the litigation and involved difficult decisions balancing the interests of those plaintiffs with more immediate and manifest medical needs against those with less pressing or less obvious medical problems, as well as balancing the needs of the foreign and domestic plaintiffs. And, of course, the guardian had to participate in settlement negotiations in individual cases as well, in many instances on the eve of trial, or even, as in the *Zimmerly* case, during trial. This required a thorough and current familiarity with the facts of the individual cases and required substantial time, professional skill and judgment.

The guardian now seeks compensation for his work prior to May 17, 1981, the date established as the cut-off point by the Court of Appeals' opinion in *Schneider v. Lockheed Aircraft Corp., supra.* The awarding of fees for the guardian *ad litem* as costs in these actions was challenged in that appeal, and the Court of Appeals specifically held that this Court "did not abuse its discretion in taxing costs against Lockheed for the guardian *ad litem* services performed up to and through *Schneider, Marchetti,* and *Zimmerly II.*" *Id.* at 855. It is clear from the foregoing that he has devoted substantial time and resources to this case, and is necessarily entitled to compensation from some source. The issue is whether the fees to which the guardian is undoubtedly entitled are to be paid by defendant or through some mechanism not yet identified, by plaintiffs.

The Court concludes, as the Court of Appeals indicated, that defendant is primarily responsible for compensating the guardian. These infants were about one year old at the time of the crash. They require continuing examination and protection because they were exposed, by the decompression and

the crash, to an illness which may not immediately manifest itself in symptoms, but rather may appear most vividly and have its most deleterious effects years after the exposure of the infant to the forces which caused it. The defendant has agreed not to contest its liability for damages proximately caused by the crash. The cost of the services of a guardian is one such liability. At the very least a defendant who does not contest liability for a crash of the violence of this one may not contest its responsibility for the cost of monitoring infant passengers to determine whether they have been injured and, if so, what their injuries are, and to balance and protect the claims of those who suffer the effects of the crash either now or in the future.

Actually, a guardian should have been appointed at the beginning of this litigation. *See, e.g., Franz v. Buder,* 38 F.2d 605 (8th Cir. 1930) (under Equity Rule 70, from which Fed. R. Civ. P. 17(c) is derived). Defendant's expense could thus have been much greater. In any air crash as violent as this one, which carried 144 passengers to their deaths, it should be clear that one proximate result of the crash is that any infants who are aboard the plane require a guardian *ad litem* to protect their interests. The crash made it necessary to appoint a guardian *ad litem* to monitor their condition, to make sure whether they have or have not been injured, and to protect their legal interests. Fed. R. Civ. P. 17(c) provides that "the court shall appoint a guardian *ad litem* . . . or shall make such other order as it deems proper for the protection of the infant or incompetent person." The guardian *ad litem* is an officer of the Court whose appointment was made necessary by the crash and the ensuing litigation initiated for the infants by FFAC. *Franz v. Buder,* 38 F.2d 605 (8th Cir. 1930); *see also Panitch v. Wisconsin,* 451 F.Supp. 132 (E.D. Wisc. 1978).

The authority of the Court to award a reasonable fee to the guardian *ad litem* is implied from the power to appoint him, a power which Fed. R. Civ. P. 17(c) undoubtedly gives the

Court. This fee may be properly taxed as costs, since it is an expenditure necessary to the performance of the judicial function. *Hoffman v. Morgan*, 206 Okla. 567, 245 F.2d 67 (1952). This practice of taxing the fees of the guardian *ad litem* as costs is not only supported by federal precedents such as *Franz* and *Panitch, supra,* but is also followed in a great many states. *See generally* Annotation, *Allowance of Fees for Guardian Ad Litem Appointed for Infant Defendant as Costs,* 30 A.L.R. 2d 1148 (1953). Such a practice is consistent with the "American rule" that compensation for prevailing counsel is not normally taxable as a cost. *See Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). Rather, this expense is more like the fee paid to an auditor to which a case is referred for a preliminary hearing, which was held to be taxable as costs in *In re Peterson,* 253 U.S. 300 (1920). Thus, a defendant who admits liability for the crash necessarily admits responsibility for the costs of the guardian *ad litem* made necessary by that crash.

In addition, this Court, in its Comprehensive Pretrial Order entered October 30, 1980, held that as a result of Lockheed's agreement not to contest liability, each individual infant is to be deemed a prevailing party. While portions of this Court's Comprehensive Pretrial Order were overturned on appeal, the ruling that each plaintiff is a prevailing party was left undisturbed, at least with respect to the entitlement of the guardian *ad litem* to compensation for his services through the date of the Court of Appeals' decision. It is now settled by the decision of the Court of Appeals in *Schneider, supra,* that the compensation for the guardian *ad litem* is properly taxable as a cost. Since plaintiffs are all prevailing parties, defendants are liable for these costs. This would be true even if a plaintiff had recovered only nominal damages. *See Chesapeake and Potomac Tel. Co. v. Clay*, 90 U.S. App. D.C. 206, 194 F.2d 888 (1952); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993 (5th Cir. 1976). But in these cases, each plaintiff has recovered $5,000 as a result of the aforementioned stipulation, and is thus *a fortiori* a prevailing party and entitled to costs, whether

or not he recovers further amounts at trial. Plaintiffs have also secured the defendant's agreement to pay 30% of any judgment without awaiting appeal; several plaintiffs have already recovered these amounts. Several others have gained substantial recoveries by settlement.

Lockheed maintains that the stipulation in which it agreed not to contest liability was not a one-sided victory for plaintiffs. It is true that plaintiffs in return gave up their claim for punitive damages; however, it is settled that plaintiffs need not prevail on all of their claims to be prevailing parties. *See Chesapeake and Potomac Tel. Co. v. Clay, supra;* 10 C. Wright & A. Miller, Federal Practice and Procedure § 2667 n.8 (1973) and cases cited therein.

The Supreme Court has recently reaffirmed this proposition in *Hampton v. Hanrahan,* 446 U.S. 754 (1980). Though the Court reversed the granting of interlocutory attorney's fees in that case, on the ground that plaintiffs had not yet been determined to be prevailing parties, it reiterated that such awards are appropriate where the plaintiff has established his entitlement to some relief. *Id.* at 757. Plaintiffs here have done more; they have actually received relief in the form of the $5,000 payment and the agreement to pay 30% of any judgment without appeal, the payment of such amounts to some plaintiffs after extensive jury trials, and by substantial awards by settlement.

Although the stipulation of September 14, 1979, ¶13(d), reserved the issue of whether guardian's fees were payable as costs or out of the recovery or in some other manner, this merely operates to reserve the issue of whether the fees are properly chargeable as costs, not the issue of who is liable for costs. The issue of whether guardian's fees are properly chargeable as costs has been resolved adversely to defendant by the Court of Appeals, and in view of defendant's agreement not to contest liability for damages proximately caused by the crash, it cannot now dispute that plaintiffs are the

prevailing party. Accordingly, the guardian is entitled to summary judgment against defendant for the amount of his reasonably incurred guardian's fees. There remains for consideration the amount of these fees.

In establishing the amount of fees to which the guardian is entitled, this Court will adopt the method established in *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 641 F.2d 880 (1980), for calculation of attorneys' fees. This decision contemplates the Court first determining a "lodestar" fee based upon the number of hours spent and the normal market value of those services. The guardian has submitted an affidavit on the number of hours he has spent on these cases since his appointment and through May 19, 1981. He claims to have rendered services, the time-charge for which totalled $487,276.50, and to have incurred expenses of $45,935.91. He has already been paid a total of $156,278.71, which leaves a balance of $376,933.70. His affidavit includes biographies of all lawyers who worked on the case, as well as a statement that the rates at which compensation is sought are the normal billing rates for the respective members of the firm. Defendant has not challenged the rates. The Court finds that they are reasonable and constitute the market value of the services performed. Accordingly, these rates, multipled by the number of hours properly allowable, will constitute the "lodestar" for purposes of determining the amount owed under *Copeland v. Marshall, supra.* The guardian does not now seek an upward adjustment of the lodestar for contingency, delay or similar factors, and the Court specifically finds that no downward adjustment is appropriate. These determinations are without prejudice to further interim and final computation as this complex matter unfolds.

There remain at present two other issues: whether any of the hours spent and expenses incurred were spent unreasonably or on matters that are more properly the responsibility of litigation counsel than of a guardian, and whether there

should be subtracted from the amounts found owing amounts that have been or are to be set aside from the judgments in three cases which were settled prior to May 18, 1981.

The guardian has divided the time spent in this case into five categories: court appearances, communications with the families of the infant plaintiffs, settlement negotiations, administration of the Guardian's Fund, and legal issues. There can be little serious dispute as to the appropriateness of the first four of these categories of expenses. The guardian spent substantial time studying and perfecting the Court's suggestion that a trust mechanism might best accommodate the varying medical needs of individual plaintiffs injured in the crash. *See, e.g.,* Memorandum of May 30, 1980. Many of the court appearances of the guardian were at the specific request of this or other courts, and related to conferences about settlement negotiations and scheduling, important responsibilities of the guardian in this case. Communication with the families, negotiation of settlements and administration of the Guardian's Fund are similarly at the core of the duties of a guardian *ad litem.*

Defendant objects to the guardian's three trips to Europe to meet with parents of infants, principally because it views these expenses as undertaken primarily to promote the plaintiffs' chances of success in this litigation. However, the guardian can quite properly conclude that the interests of each infant who was on board the C-5A are best served by his joining in this suit, because, among other things, the consequences of the crash to each infant may not be apparent immediately. The guardian's efforts in this respect promote the interests of all the infants. The Court finds that these expenses are reasonable and properly recoverable.

Time spent researching legal issues requires some discussion. Defendant has claimed that no time spent on legal issues is recoverable under *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). That position was rejected by the

Court of Appeals in *Schneider v. Lockheed, supra.* But time spent on legal research that is more properly the role of litigation counsel should not be recoverable as a cost. *See, e.g., Franz v. Buder, supra.* At the request of the Court, the guardian has furnished a further breakdown of the hours spent on legal issues in his Third Supplemental Affidavit of November 16, 1981. There he divides the time spent on legal issues into ten categories: duties of the guardian *ad litem*, responsibility for fees and costs, filings responsive to pleadings of defendant and third-party defendant, prejudgment interest, *forum non conveniens,* administration of judgments, filings requested by the Court, the motion for preliminary injunction still under advisement, collateral estoppel, and miscellaneous issues. Time spent researching the duties of the guardian, responding to pleadings directed against the guardian by defendant and third-party defendant, research incident to administration of the judgments and filings requested by the Court are all clearly recoverable, as the Court of Appeals has suggested. *Schneider v. Lockheed, supra,* at 854-55.

Research on payment of fees and costs, prejudgment interest, *forum non conveniens,* and statute of limitations (one of the miscellaneous items) was done so that the guardian could arrive at an independent judgment on the value of plaintiffs' claims for settlement purposes. Though it may be that it is entirely proper for the guardian to furnish such a second opinion to plaintiffs, this is not the sort of expense which may be properly charged to Lockheed. Evaluation of claims and settlement offers and resolution of legal uncertainties in connection with such evaluations is a task normally performed by counsel. The function of a guardian *ad litem* is to protect the interests of those unable to protect their own interests. Many adult plaintiffs evaluate settlement offers without obtaining second opinions on the value of their claims or attempting to charge the costs of doing so to their opponents. While the infants here, who are incapable of exercising this choice for themselves, are entitled to a fully informed and competent

judgment by someone with the capacity to exercise choice for them, they are not necessarily entitled to have this choice made by someone with all of the knowledge of litigation counsel on the legal issues involved, compensated at defendant's expense. However, the Court is persuaded that the relatively small amounts of time spent researching the issues of the preliminary injunction and collateral estoppel were reasonably spent in determining whether or not to pursue alternative courses of obtaining medical care and in developing an initial report to the parents.

The time spent in determining whether to retain the Lewis firm to litigate these cases and in developing the various trust provisions which might be used to protect sums recovered or received from settlements by the infants is clearly appropriate for a guardian *ad litem* and thus properly compensated by defendants. These items are elements of what the guardian has termed "miscellaneous" time, a category which also includes research on statutes of limitation, which is not compensable by defendant. Since some of these expenses are recoverable from defendant while others are not, and the expenses are not distinguished from each other by the guardian, the amounts currently in the "miscellaneous" category are excluded from the amount which the Court can now award. The guardian may file additional affidavits which state which of these expenditures fall into which categories to perfect his claim for those activities which are recoverable from defendant under the principles announced here.

Accordingly, the Court has determined that of the total additional compensation claimed by the guardian, $82,387.00, the amount of the disallowed claims for legal research, is not now recoverable from defendant. This leaves a total of $294,456.70 presently owed by defendant to the guardian. Lockheed claims, however, that it is entitled to setoff from this amount the portion attributable to the three cases that were settled prior to the Court of Appeals' decision

(the cases of Adam Hung Wright, James Everett Reynolds, and Li Thi Hoang Phi Caspar). The guardian responds that the amounts which were set aside for the guardian *ad litem* in those cases were intended as insurance against the possibility that the guardian might go unpaid if this Court's determination that Lockheed is responsible for the fees of the guardian *ad litem* is reversed. However, Lockheed has persuasively responded that its settlements in these cases were intended to dispose of all claims by these plaintiffs against defendant, including costs of which the guardian's fees are an element. This Court has previously ordered that six and two-thirds percent of the settlement amounts in two of these cases be set aside for the guardian. The Court concludes that this approach should also be applied to the third of these cases (Caspar). The Court also concludes that one-half of the amounts so set aside is a reasonable approximation of the amount of the guardian's fees which are reasonably attributable to these cases. Though all plaintiffs have benefited from the guardian's activity, these plaintiffs have especially benefited from the effort made on behalf of plaintiffs who went to trial and by receiving an earlier recovery than many of their peers. Moreover, the guardian's participation in the settlement negotiations in these cases was for the direct and primary benefit of these plaintiffs. Finally, these plaintiffs can be reimbursed if it later appears that their share of the guardian's fees is disproportionate to that of other plaintiffs.

Accordingly, the Court concludes that defendant is entitled to a further credit in the amount of $72,036.00, representing one-half of the sum of the $66,700.00 set aside in *Wright*, $57,362.00 set aside in *Reynolds*, and $20,100 to be set aside in *Caspar*. This leaves the sum of $222,510.00 which is the amount the defendant must now pay to the guardian. This amount is certainly not unreasonable in view of the size of the settlements and verdicts which have been entered in these cases. In any future judgment or settlement which does not leave guardian fees to be determined separately, the sums

determined to be owed for such fees will be assessed for services provided after May 19, 1981, and will of course be governed by the requirement of the Court of Appeals that services after that date be shown to have benefited the particular plaintiff.

Accordingly, an accompanying order grants judgment to the guardian against Lockheed for $222,510.00, and sets a hearing on February 5, 1982, at which time any of the plaintiffs in the three settled cases mentioned above may show cause why one-half of the amounts set aside for the guardian should not be disbursed to the guardian. The guardian may submit an additional affidavit to further segregate the "miscellaneous" time for which he is entitled to reimbursement. None of the foregoing precludes later review or further interim and final payments to the guardian *ad litem*.

UNITED STATES DISTRICT JUDGE

Date: January 27, 1982

Opposition

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No. 81-1270

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOCKHEED CORPORATION, PETITIONER

v.

MICHAEL MOSES SCHNEIDER, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner Lockheed Corporation seeks review of the judgment of the court of appeals upholding the assessment of fees and expenses of a guardian ad litem, including legal expenses, as "costs" pursuant to Fed. R. Civ. P. 54(d). The United States, a third-party defendant, has a financial interest in resolution of the question presented since it is obliged to pay part of the fees and expenses assessed as costs.

In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), this Court held that attorneys' fees can be assessed as costs only as prescribed in 28 U.S.C. 1920, 1923(a) or some other statute.[1] The predecessor to Section 1920 was explicit (10 Stat. 161; emphasis added): "[I]n lieu

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[1]The Court acknowledged certain judicially created exceptions to the general rule (421 U.S. at 257-258), but none of those exceptions is applicable in this case.

of the compensation now allowed by law to attorneys, solicitors [and other specified officers] * * * the following *and no other compensation shall be taxed and allowed.*" See also 421 U.S. at 255 & nn.26, 27. Although the language prohibiting the award of attorneys' fees as costs in amounts greater than those specified was omitted in the 1948 codification, the Court concluded in *Alyeska* that no change in the construction of the provision was warranted. *Id.* at 256 n.29.

Nearly 40% of the work for which the guardian ad litem in this case seeks compensation is for legal research and drafting of legal papers. Pet. 6 n.7, 9 n.10. In the view of the court of appeals, however, since these legal fees were sought by an attorney who was also the guardian, *Alyeska* was not controlling. Pet. App. 42a. The Eighth Circuit has squarely rejected the contention that attorneys' fees may be assessed as costs simply because an attorney is also the guardian ad litem. *Franz* v. *Buder*, 38 F. 2d 605, 607 (1930).

It may be that Fed. R. Civ. P. 17(c), authorizing the district courts to appoint a guardian ad litem, implies authority to make some arrangements for his compensation. See *Mutual Life Insurance Co.* v. *Ginsburg*, 228 F. 2d 881, 883-884 (3d Cir), cert. denied, 351 U.S. 979 (1956). Cf. *Ex parte Peterson*, 253 U.S. 300, 314-315 (1920). In light of the statutory limitations on the assessment of costs, however, it does not follow that all or any of the expenses of a guardian may be charged to the guardian's adversary as costs. Moreover, attorneys' fees, even if paid to a guardian, may only be assessed as provided in Section 1920 and 1923(a) or some other statute.[2]

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[2] *Peterson* indicates that 28 U.S.C. 1920 governs only the assessment of costs for the items specified and does not preclude the assessment of other items as costs. But see 421 U.S. at 251-252, 263. Particularly since *Alyeska*, however, some courts appear to have accepted the view that only those items specified in Section 1920 or some other statute may be

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

FEBRUARY 1982

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assessed as costs. See Pet. 11 n.13, 12-14. If, as we contend, Fed. R. Civ. P. 17(c) does not imply any authority to award a guardian ad litem what are in effect attorneys' fees, this case would present a vehicle for needed clarification of the extent to which nonstatutory items may be assessed as costs.

Petitioner's Reply Brief

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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1. Respondents incorrectly suggest that the district court's January 27, 1982 decision makes this case not ripe for review. At the end of the *Zimmerly* trial in February 1981 the district court taxed some $400,000 in guardians' fees and expenses against Lockheed. (Pet. 8.) As respondents recognize (Opp. 4), the court of appeals upheld that award. In July 1981 the guardians moved, "in light of * * * the Court of Appeals ruling," for approximately $500,000 for services through May 19, 1981.[1] The district court, relying on the court of appeals decision,

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[1] Guardian Ad Litem's Motion For Partial Summary And Final Judgment, p. 1 (July 22, 1981). See Pet. 9 n.10.

has now granted that motion in principal part, specifying the amount of guardians' fees to be recovered from Lockheed through May 19. (Opp. App. 1a-19a.)[2]

Respondents offer two reasons for believing that the district court's decision of January 27 affects our petition. First, they suggest that Lockheed might successfully appeal the decision and moot the issues presented here. (Opp. 14-15.) That suggestion is far-fetched. The court of appeals ruled that the guardians' fees may be taxed as costs against Lockheed and denied our petition for rehearing on that issue. Its decision is the law of the circuit and the law of the case. The notion that an appeal of the district court's latest decision fixing the amount of those fees might lead the court of appeals to overrule itself is simply unrealistic and is not a reason for denying certiorari. Every court of appeals decision presented to this Court for review stands the chance of some day being overruled by the court of appeals itself.

Second, respondents point out that the district court has left open the possibility that additional fees for some of the guardians' "miscellaneous" legal services will be taxed as costs against Lockheed. (Opp. 14; Opp. App. 17a, 19a.) The total amount claimed for the guardians' "miscellaneous" legal services is less than $20,000:[3] whether some of that amount will subsequently be taxed against Lockheed is an inconsequential tag that has no bearing on the finality of the court of appeals' judgment from which we seek certiorari.

In short, the district court's recent decision should not be allowed to defeat the grant of certiorari. Neither the unrealistic prospect of mootness nor the fine tuning of

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[2] The district court's order provides for the recovery of $222,510, in addition to the $156,278.71 already paid by Lockheed. (Opp. App. 14a.)

[3] Third Supplemental Affidavit accompanying the guardians' motion for judgment, p. 5.

the taxation of "miscellaneous" guardians' fees makes this case not ripe for review.

2. Respondents also say that their pending motion for sanctions, including guardians' fees as costs, makes the case too unsettled to be accepted for review. (Opp. 12-14.) But the propriety of the taxation of guardians' fees as costs is not presented in the sanctions motion. It may be that, if the district court grants respondents' motion, it will assess costs, including additional guardians' fees, as a sanction: but if it denies the motion there is no possibility that it will undo the awards of guardians' fees that it has already made for the period ending May 19, 1981. The chance that Lockheed will be taxed with *more* guardians' fees does not effect the finality of the fees already taxed or the ripeness of the issue whether that taxation was lawful.[4]

3. Respondents dispute the contention of Lockheed and the Solicitor General that there is conflict and uncertainty among the decisions of this Court and those of the courts of appeals. They suggest that the presence of an "exceptional circumstances" exception to the rule against taxation of nonstatutory costs harmonizes all the decisions. (Opp. 22; see generally *id.* 17-22.) But an exception so broad and so vague that it results in a rule whereby the lower courts must abide by Section 1920

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[4] Even if the propriety of taxing additional guardians' fees as costs were presented in the sanctions motion, that would only be another in what will be many future occasions in this litigation when the taxation of costs may be considered. For example, on February 5, 1982, in *Kurth* v. *Lockheed*, the first case in this litigation to be tried since the court of appeals' decision, the jury returned a verdict for Lockheed. On February 10 the district court entered a judgment "without prejudice to an application for an award of fees and expenses" by the guardians. Any taxation of those additional fees against Lockheed will technically be appealable. The same is true of additional fees that may be taxed in the more than 100 cases in this litigation awaiting trial below. None of that makes the court of appeals' judgment from which we seek certiorari any the less final.

except when they wish to do otherwise contravenes this Court's decisions in *Alyeska Pipeline* and *Roadway Express* and defeats the congressional goal of uniformity expressed in that statute. Certiorari should be granted so that the Court may afford "needed clarification of the extent to which nonstatutory items may be assessed as costs." (Memorandum For the United States, pp. 2-3 n.2.)

Moreover, although the district court has reduced the guardians' award by some $80,000 in fees for legal services, there remains approximately $120,000 in fees awarded for legal services. Thus the conflict between the decision of the court of appeals below and the decision of the Eighth Circuit in *Franz* v. *Buder*, 39 F.2d 605 (1930), has not been attenuated.

4. Respondents incorrectly contend that Lockheed caused and benefitted from the initial appointment of the guardians. (Opp. 7-9, 24-25.) The court of appeals held that "the issues relating to FFAC's capacity to sue" caused the appointment of Mr. Work and his firm as *amici* (Pet. App. 39a-40a), and the same is true for their appointment as guardians. It simply cannot be that, because FFAC sued on behalf of persons with no knowledge of the suit, Lockheed was required either (1) to risk litigating against the wrong representative,[5] or (2) to finance litigation against itself by paying the fees of guardians to cure plaintiffs' self-inflicted defects in capacity. Nor is it true that FFAC had to sue "protectively" on behalf of the children. (Opp. App. 5a.) Limitations statutes are tolled during an infant's minority. When FFAC sued, the children were in the homes of their adoptive parents. FFAC could have contacted the

[5] Lockheed was reluctant to try or settle any individual plaintiff's case lest that plaintiff subsequently appear, challenge the settlement or the judgment on the grounds that FFAC was not authorized to sue on his or her behalf, and seek to litigate anew. Lockheed's Motion for Summary Judgment of September 29, 1978.

parents and urged them to sue. Instead FFAC itself sued, whereupon its lawyers contacted the parents and suggested that they enter the case and retain the lawyers, whereupon Lockheed was ordered to pay the fees of guardians appointed, in the district court's words, to "cure" FFAC's defects in capacity. (Pet. 8; Pet. App. 62a.) In these circumstances Lockheed cannot be said to have caused or to have benefitted from the appointment of the guardians.[6]

5. Disregard for the parents' role also permits the respondents and the district court to maintain that the continuing participation of the guardians in the litigation is necessary. In all of the cases tried to date the guardians have been participating since late 1979, at Lockheed's expense, along side of the children's parents and the lawyers hired by those parents. The guardians are not guardians of the parents, and the parents (a) are not incompetent or otherwise in need of a guardian and (b) have retained counsel to explain the litigation to them. Even in complicated litigation plaintiffs represented by retained counsel are not entitled to an additional set of counsel, called guardians and paid for by the defendant, to assist them in comprehending the litigation or to "monitor[ed] the performance of plaintiffs' counsel" or to take "an active role in settlement negotiations." (Opp. App. 9a.)

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[6] One or more guardians went to Europe three times to persuade foreign parents to sue Lockheed. It is hard to see why that was of such benefit to Lockheed that in fairness Lockheed should be required to pay the travel and hotel expenses and the hourly rates of the guardians during those trips.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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